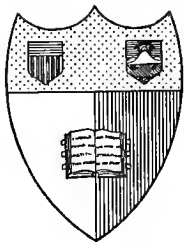

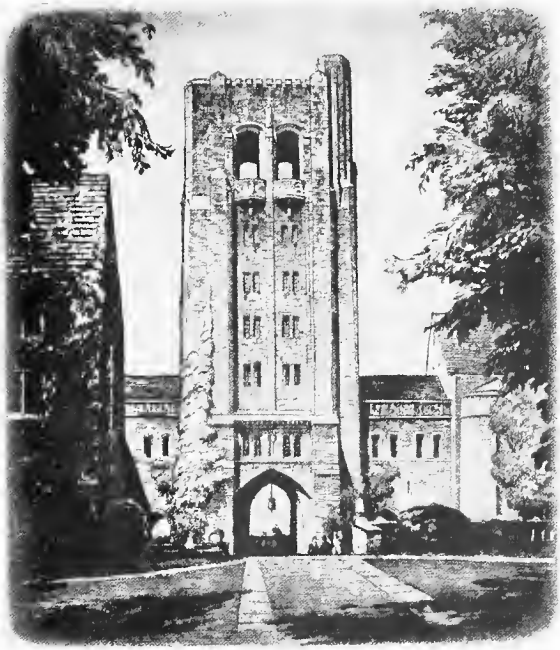

MACER'S

DILAPIDATIONS:

LAW AND PRACTICE,

BY

ARTHUR BURNABY HOWES.

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BY

ARTHUR BURNABY HOWES,

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PREFACE.

ALTHOUGH the original plan of this work has been adhered to as far as possible, all the chapters have been revised or re-written, while others have been added, and the whole brought up to date. It is therefore hoped that, while meeting the requirements of the Student, the book will be found equally useful to the Surveyor, Property Owner, or Legal Practitioner, all the latest decisions and legislation on the subject being included in it.

In the first chapter, definitions are given of those legal terms which must necessarily be used in matters relating to real property, and which may not be readily understood by the student or lay reader.

Following the plan of the previous editions, some questions of the type usually set in the Examinations of the Surveyors' Institution have been included in the Appendix, for the benefit of students.

A. B. H.

6, MIDDLE TEMPLE LANE,
TEMPLE, E.C.
January, 1912.

PREFACE TO FOURTH EDITION.

My primary object in compiling the First Edition of this little work for the Press was to produce a text book which might be of assistance to students in preparing for the examinations of the Surveyors' Institution. At the same time, I ventured to hope that a reference book upon this complicated subject written in as concise a form as possible would be acceptable to the busy man of affairs, to whom the larger reference works and records of law cases might not be easily accessible. That it has become necessary to prepare a Fourth Edition is evidence that both objects have been achieved and that the work has been acceptable to the Profession generally.

In preparing the Fourth Edition the whole of the matter has been carefully revised, re-written and brought up to date, while the most recent important legal decisions have been considered in the text, and some of them have been set out at length in a Compendium.

ALFRED T. MACER.

39, Cheapside, E.C.
August, 1907.

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CHAPTER I.

INTRODUCTION AND DEFINITIONS.

As this book is intended primarily for the use of students and laymen, it is deemed advisable, in order to avoid the necessity of frequent explanatory definitions in the text, to devote the first chapter to a brief description of the various "tenures" or modes of holding Land, and also to give short definitions of the legal terms which must necessarily occur. The explanations given are of a very elementary character, and are only intended to be of use to the lay student.

The law relating to Dilapidations deals with damage caused to land, houses, etc., by a person in temporary possession, resulting in loss to the present or future owner of the land, so that some knowledge of the different conditions under which land is held is necessary to the student. It should be remembered that while "land" in its restricted sense means soil, legally it includes everything on and in the soil, such as buildings, water, minerals, etc.

THE VARIOUS TENURES OF LAND.

Legally the King is the only absolute owner of land in this realm, hence everyone in possession of land "holds" it from the King, either directly, or from someone else who in turn holds it directly or indirectly from the King. Therefore, in law, everyone who holds land is a "Tenant" of one kind or another, although in a popular sense the word denotes an occupier of a house or land under a landlord.

A **Tenement** is technically anything of a permanent nature which is held by a tenant. In practice it has come to mean a house or other building.

There are various "estates" or interests in land, the highest being an **Estate in fee simple**, that is, where the tenant holds his land direct from the King, and without any restrictions. Such a tenant is called a **Tenant in fee simple**, or "tenant in fee" or "owner of the fee simple."

An estate in fee simple is a "freehold estate of inheritance," *i.e.*, one which descends to the heir of the owner if the latter dies without having left it by his will to someone else, or otherwise disposed of it.

Other freehold estates are "estates in fee tail," "estates for life," and estates subject to conditions such as a "fee farm rent," but, generally speaking, by "freeholder" is meant a tenant in fee simple, and by "freehold land," land held in fee simple. For all practical purposes such a tenant is absolute owner of the land and can do what he pleases with it.

An **Estate in fee tail** is also a freehold estate of inheritance, but the owner or "tenant in tail" holds his land subject to this restriction — that after his death the land must descend to the *heirs of his body*— *i.e.*, to his children, grandchildren, etc., male or female, so long as his posterity continues. Such an estate is said to be *in tail general*, but it may be *in tail special* if it is limited to particular heirs of the tenant's body, either male or female, *e.g.*, to the male children of his first wife.

A tenant in tail in possession can, by a deed, "bar" (that is, destroy) the entail, and thus convert the estate tail into an estate in fee simple.

When an estate in fee tail is granted to a husband and wife and their children, if either the husband or the wife dies before any children are born to them, the survivor is called the **Tenant in tail after possibility of issue extinct,** and on his or her death (provided the entail be not barred) the property will *revert* to the original grantor or his heirs, or will descend to some other person to whom it has been previously granted by the grantor, the grant to take effect after the termination of the estate in tail.

After possibility of issue is extinct, the estate of a tenant in tail becomes an estate for life.

An **Estate for life** is a freehold estate *not* of inheritance; that is to say, the children or heirs of the owner of the estate do not inherit the property after his death. The owner is called the **Tenant for life** or Life tenant. The land may have been given to him (1) to hold during his own lifetime, or (2) to hold during the continuance of the life of some other person. In the latter case the estate is

said to be an estate *pur autre vie.* Both the above estates are expressly created by the act of the parties, and are said to be *conventional* life estates.

There is another kind of life estate, viz., *Legal*—*i.e.*, created by law, namely: (1) The estate possessed by a tenant in tail after possibility of issue extinct, as already explained; (2) *Curtesy of England*, the estate which a widower has in his late wife's fee simple or fee tail land after her death, unless she has otherwise disposed of it; (3) *Dower*, the right which a widow has in a third part of the lands of which her husband was owner, either in fee simple or fee tail, and which he has not devised (or left) by his Will.

In every life estate the freehold is the property of the life tenant, but his rights are limited and are subject to the Settled Land Acts, 1882-1890.

A Copyhold estate is one forming part of a manor. Land is held under the lord of a manor by virtue of a "copy" of the rolls of the court of the manor. Originally the land was held during the pleasure of the lord, and in theory the tenant (or copyholder) is a tenant-at-will, but in practice, owing to custom, the estate of a copyholder is in most respects as absolute as that of a tenant in fee simple.

Copyholds are always subject to the custom of the particular manor to which they belong, especially with reference to the admittance of successive tenants, when certain payments (either in money or cattle) have to be made. Like freeholds copyholds are considered "real" property, and in case of intestacy descend to the heir.

The timber and minerals are generally held separately from the land and belong to the lord of the

manor, or to other persons to whom he has granted them. The freehold of a copyhold estate belongs to the lord of the manor, but copyholds may be "enfranchised," *i.e.*, converted into freeholds, by the lord transferring the fee simple to the copyholder, the latter having now a right by Act of Parliament to compel the lord to do so on payment of proper compensation.

An **Estate for years** or a **leasehold estate** is a tenure of land held on lease. A **Lease** (or as it is sometimes called a **Demise** or a **Tack**) is a conveyance of property, generally for a definite term of years (although it can be for life or at will) by a person who holds a greater interest in the property than the lease which he then grants. For instance, a tenant in fee simple can grant a lease, say, for 1,000 years. The person who conveys the property is called the landlord or "lessor," and the interest which he retains in the property is his "reversion"; the person to whom the property is let is called the tenant or "lessee." A lease is generally written in duplicate, one copy (the "lease") being signed by the lessor and given to the tenant, the other copy (the "counterpart") being signed by the lessee and given to the lessor.

A lease is a **Chattel real**, *i.e.*, an interest in land which does not amount to freehold and which is considered to be personal property and not "real" property, since the latter expression only includes freehold and copyhold estates.

Any letting of land, whether it be for a week or for 99 years, is, strictly speaking, a lease, provided it has a fixed time at which to begin and end, although, popularly speaking, the expression is usually only applied to a letting for a longer period than three

years, which must be by deed, *i.e.*, by a formal document "signed, sealed and delivered" by the parties to it.

A lease for not more than three years from the date of making thereof, and provided the rent is at least two-thirds of the full annual value of the land, may be made verbally, but in practice it is usually put into writing, setting out the length of the tenancy, rent, conditions, etc., and signed by the parties, and is called an **Agreement**, to distinguish it from a lease under seal. Such tenancy may be weekly, monthly, quarterly, or yearly, or it may be for the full three years from the date of making the agreement.

Every lease, whether under seal or under hand (*i.e.*, not under seal), requires stamping in accordance with the Stamp Act, 1891, as amended by the Finance Act, 1910, the amount of the stamp duty varying according to the rent and according to the length of the lease.

Land is usually held in *severalty*, *i.e.*, by persons who are sole owners of ascertained shares, but in some cases it is held by two or more persons at the same time in some form of undivided tenancy.

Undivided ownership or tenancy is of three kinds:—

1. **Joint tenancy** is where two or more persons have one and the same interest in the whole property in undivided shares. The estate must have been created by one and the same conveyance of the property. Since the ownership is undivided, on the death of one joint tenant his interest vests in the surviving joint tenants, unless he has disposed of his share during his lifetime.

2. **Tenancy in common** is where two or more persons have undivided but distinct shares in the same property. The shares may be equal or unequal, and are held by distinct title. On the death of a tenant in common his share goes to his heir, and not as a joint tenancy to the surviving co-tenants.

3. **Coparcenary** is where two or more persons inherit property together. They are called "coparceners" or "parceners," and each has an equal title to the property, his share, on his decease, going to his heir.

THE DIFFERENT LEASEHOLD TENANCIES.

Houses and lands may be let on lease for any length of time, and the kind of tenancy depends on what the landlord and tenant mutually decide.

Tenancy at will is where lands or tenements are let by one man to another to hold them as long as the former (the lessor) chooses. The lessee is called the *tenant at will:* he can leave when he likes, and is liable to be turned out at any time by the lessor demanding possession. A tenancy at will is the smallest estate in land known to the law, and only arises in practice in a few cases, such as where a caretaker is put in charge of an empty house, or where a tenant enters under a void lease, or enters pending a treaty for purchase, etc. The Courts have never been in favour of such tenancies, and if in the agreement a payment of rent is reserved, or if a rent is paid, will hold them to be yearly tenancies, unless it is clearly the intention of the parties to create a strict tenancy at will.

Tenancy at sufferance is where a tenant has entered under a lease which has come to an end, and

the tenant remains in possession without the assent or dissent of the landlord or other person entitled to possession. Legally such holding over is wrongful; but when the tenant continues to pay or expressly agrees to pay the same rent as during the lease, a yearly tenancy will be created, on the same terms and conditions as those contained in the expired lease, so far as they are applicable to a yearly tenancy.

Tenancy for less than a year. — Working class dwellings, small suburban flats, maisonettes, etc., and also furnished houses and apartments, are frequently let by the week, month, or quarter. Such tenancies are generally spoken of as a weekly, or monthly, or quarterly tenancy, as the case may be, and if the premises have not been taken for a definite length of time, are usually terminable by a week's, month's, or quarter's notice. A weekly tenancy has been held to be a re-letting of the premises by the landlord at the beginning of each successive week.

Tenancy from year to year (or Yearly tenancy) is one which can only come to an end on the first or some subsequent anniversary of the commencement of the tenancy. Such a tenancy arises either by express agreement in writing (or verbally if the rent is at least two-thirds of the full value of the land) between the landlord and tenant, or impliedly, *e.g.*, in the case of a tenant holding over after the expiration of a lease. The tenant is called the *Tenant from year to year* (or *Yearly tenant*) and he is in ordinary cases entitled to give or receive six months' notice to quit, terminating on the anniversary of the commencement of the tenancy. Until such notice is given by either party the tenancy may go on

indefinitely. Agricultural tenants are, by the Agricultural Holdings Act, 1908, entitled to twelve months' notice to quit, unless it is expressly agreed between the landlord and tenant that only six months' notice shall be given.

Tenancy for years or **Tenancy for a term of years** is where a tenant, called the **Tenant for years**, holds land for a definite number of years under a lease. It may be for two years or any other definite number of years. Some writers, and old Acts of Parliament, include tenancies from year to year under the heading of tenancy for years, but as originally, yearly tenancies were only considered to be tenancies at will terminable by due notice to quit, to thus include them is somewhat confusing, the more so, as in recent legislation, *e.g.*, the Agricultural Holdings Act, 1908, s. 48 (1), tenancies from year to year are mentioned as distinct from tenancies for a term of years, and for practical purposes in dealing with the Law of Dilapidations, it is easier to consider them as distinct, as the liability for dilapidations of the two classes of tenants is different.

Certainly neither a weekly tenancy[1] nor a quarterly tenancy[2] amounts to a tenancy for years.

If premises are let for "one year and so on from year to year" and there is no provision for quitting at the end of the first year, this will be a tenancy for at least two years, since no valid notice to quit could expire before the end of the second year, and consequently such tenancy will be a "tenancy for years."

[1] *Lloyd* v. *Rosbee*, (1810) 2 Camp. 453.

[2] *Williamson* v. *Hall*, (1837) 3 Bing. N.C. 531.

DEFINITIONS OF LEGAL TERMS.

Administrator.—A person appointed by the Court to administer the estate of one who has died without making a Will, or who has failed to appoint executors in his Will.

Advowson.—The perpetual right of nominating a clergyman to the incumbency of a church when the living becomes vacant. The owner of the advowson is termed the patron of the benefice. He has no property or interest in the glebe or tithes, which belong to the incumbent.

Agreement for a lease is a contract made between two persons whereby one agrees to grant, and the other agrees to take, a lease of the property in question. The conditions or covenants of the proposed lease are outlined shortly in the agreement, and it is signed by the parties. An agreement for a lease must, under the Statute of Frauds, be in writing, and it must be stamped in the same way as if it were the actual lease, but when the latter is subsequently granted it is charged with the duty of 6d. only.

Assignment.—A transfer or conveyance of property such as a lease or reversion, etc. The person transferring or assigning his interest is called the **assignor**, and the person to whom the assignment is made is called the **assignee** or assign. The word "assigns" in a deed extends not only to the immediate assignee but also to all future assignees. Assignments must always be by deed.

Building Lease.—A lease of land for a long term of years (often 99), in which the lessee covenants to build on the land, usually within a stipulated time.

Common Law.—The ancient law of the country, including those principles, usages, and rules, applicable to the government and security of person and property, which do not rest for their authority upon any express Act of Parliament, but are deduced from custom and the decisions of the judges.

Condition precedent.—A condition which must occur or be performed before some specified right or claim can be enforced.

Condition subsequent.—A condition, by the failure or non-performance of which, some right or interest already in existence may be defeated.

Covenant.—An agreement or undertaking contained in a deed, *e.g.*, a covenant to repair contained in a lease. Such a covenant is said to be *express*, but certain covenants are *implied*. For instance, there is an implied covenant on the part of every tenant that he will take care of his landlord's property and use it in a tenant-like manner. A covenant is said to "run with the land" (or with the reversion) when either the liability to perform it or the right to take advantage of it passes to the assignee of the land (or of the reversion). All implied covenants run with the land, but only certain express ones.

Deed, a formal document, of paper or parchment, not only signed, but *sealed* and *delivered* by the parties to it.

Elegit, Tenancy by: a tenancy arising under a writ of *elegit* (= he has chosen), so called when a creditor having obtained a judgment against his debtor, *has chosen* to take possession of the lands of his debtor in order to satisfy his debt out of the rents and profits of the land, instead of having the debtor's

goods seized and sold by the Sheriff under a writ of *fieri facias.* The interest of the creditor is a conditional one and ceases when the debt is paid.

Executor, the person appointed by a Will to carry out the directions of the Testator. On the death of the testator his real and personal property become vested in his executor for the purpose of carrying out the provisions of the Will.

Fee Farm Rent or **Quit Rent.**—In some cases an estate in fee simple is granted (*e.g.*, by the lord of a manor) subject to the payment of an annual rent called a fee farm rent or quit rent. Such an estate is nevertheless a freehold estate of inheritance as distinguished from a grant for a term of years or for life.

Ground Rent is the rent paid by the lessee of a building lease to the owner of the land (or *ground landlord,*) and representing the value of the land apart from the building upon it.

Heir or **Heir-at-law** is the person who, after the death of an owner of an estate of inheritance, has a right to inherit such estate, if such owner died intestate, or unless the owner has devised (*i.e.*, left by his Will) the property to someone else.

Hereditaments.—Every kind of property which on an intestacy (*i.e.*, when the owner dies without having made a Will) passes to the heir-at-law.

Injunction.—An order of the High Court or, in certain cases, of the County Court, either restraining a person from doing something injurious to another's interests, or commanding something to be done, in which case it is known as a *Mandatory* Injunction.

Messuage.—A dwelling-house with a yard, piece of ground, or garden which belongs to it.

Mortgage.—A conveyance of land or other property as security for the repayment of money lent and the payment of interest.

The **Mortgagor** (the borrower) transfers his legal estate in the property to the **Mortgagee** (the lender) on condition that he (the mortgagor) shall be able to redeem the property on repayment of the loan with all interest due and costs, in accordance with the terms of the mortgage deed. The mortgagor generally remains in possession of the property. This is technically known as a "Legal" mortgage, because the legal estate is transferred to the mortgagee, and to distinguish it from an "Equitable" mortgage, in which the lender does not acquire the legal estate in the mortgaged property, but advances the money and takes possession of the title deeds of the property, with or without a written memorandum of the terms arranged or intended to be arranged.

A **Peppercorn Rent** is one requiring the annual payment of one peppercorn, if demanded. It is stipulated for in order to create the relationship of landlord and tenant and as an acknowledgment of the rights of the landlord, and is not really intended to be paid.

Privity of contract or of **Estate.**—"Privity" means participation or concurrence in knowledge or interest.

Privity of contract arises between any two or more parties to a contract which binds them all. Such relationship is created between landlord and tenant by the lease.

Privity of estate is participation of interest between two parties in the same piece of land. A tenant, so long as he is in possession, has both privity of contract and privity of estate with his landlord, but if the tenant assigns his lease, his privity of estate ceases and is transferred to his assignee, who then becomes liable to the landlord on all covenants which run with the land, although there is no privity of contract between these parties. The privity of contract between the landlord and the original tenant, however, still continues, and they remain liable to each other on all express covenants contained in the lease.

Rack rent is a rent of the full annual value of the tenement, or near it.

Remainder.—A *remainder* is similar to a reversion in so far as it is an estate or interest in property which is to come into effect after the termination of some other estate or interest, but instead of reverting to the original grantor or his heirs it is expressly provided in the conveyance that such estate or *remainder* shall afterwards pass to someone else, who is called the *remainderman*. For instance:—Smith, a freeholder, grants land to Jones for life, and after Jones's death to Brown and his heirs in fee simple: that is to say, Brown will not possess the land till after Jones's death. Jones is the tenant for life; Brown is the remainderman; and his interest is called a *remainder* expectant on the death of Jones. A remainder always has its origin in express grant: a reversion merely arises incidentally by operation of law.

Reversion or **Reversionary Interest.**—An interest in property which at some future time is to *revert* (or

return) to the original owner, after the termination of some estate or interest which he has granted in the property. For instance:—Smith, a freeholder, grants a house and land to Jones for life, or on lease for a term of years. Smith does not thereby dispose of the whole of his interest, but retains the **reversion** to the house and land, which, on Jones's death or at the end of the lease, will come back into Smith's or his heir's possession. This "reversion" Smith can sell or transfer. The owner of the reversion is called the **reversioner.**

Settlement.—A document, either a deed or a will, defining the course of succession to land or other property.

Statute Law. — Law made by Statute (*i.e.* Act of Parliament) which may create entirely new laws, codify the Common Law, or repeal, alter or consolidate previous statutes.

Under-lease or Sub-lease.—A letting of property to another tenant (termed the *under* or *sub-lessee*) by a person who himself only holds the property under a lease. The under-lease must be for a shorter period than the original lease, and the original tenant (who then becomes the *under* or *sub-lessor*) must reserve to himself a reversion, which need, however, only be for one day. If the whole term of the original tenant's lease is transferred, it will be an assignment and not an under-lease.

Waiver.—The foregoing or relinquishment of a legal right or claim by some definite act on the part of the person entitled thereto.

A waiver is *express* when the person entitled to anything, expressly, and in terms gives it up.

A waiver is *implied* when the person entitled to anything does or acquiesces in something which is inconsistent with that to which he is entitled.

For instance, the receipt by a landlord of rent due after a breach of covenant incurring forfeiture, and with knowledge of such breach, is a waiver of his right of forfeiture, unless the breach is a continuing one, such as a breach of covenant to keep in repair.

CHAPTER II.

WASTE.

THE expression **Dilapidation** signifies a defective condition of land or buildings, resulting (*a*) from decay, either from the effect of time and weather, or other natural cause, or (*b*) from some act or neglect on the part of the person in possession.

Popularly the word is used to express that condition of disrepair, for which a tenant in temporary possession of land is usually liable to the reversioner, under some express or implied covenant to repair.

In law the term "Dilapidation" is either comprised in the technical expression "Waste," or is the result of a breach of a covenant to repair.

Questions as to Dilapidations resulting from breach of covenant to repair, either implied or express, arise generally between the following parties:—

Landlord and tenant, or their assigns.

Remainderman and tenant for life.

Mortgagee and Mortgagor—

or between any other parties between whom an implied or express covenant to repair exists.

Ecclesiastical dilapidations are dealt with in a subsequent chapter.

Waste is of two kinds—(1) "Legal"; (2) "Equitable."

(1) **Legal waste** is any injury to, destruction, or substantial alteration in character of land, buildings, gardens, trees, etc., committed or permitted, in excess of his rights, by a tenant in temporary possession of such land, etc., whereby the interest of the reversioner or remainderman is depreciated.

Legal waste is of two kinds—(*a*) Voluntary; (*b*) Permissive.

(*a*) **Voluntary waste** consists of acts of *commission*, as when a tenant does something which he is bound by law, or by some express covenant, not to do; such as pulling down a house, cutting down trees, breaking up meadow land, opening new mines or gravel pits, etc., destroying landlord's fixtures, cutting a new doorway or a window, bricking up a window opening, altering a private house into a shop, altering the level of land by depositing rubbish,[1] etc., etc.

It is also waste if a tenant of a dovehouse, warren, park, fishpond or the like, take so many that sufficient store be not left as he found when he came in.

When waste is committed by a tenant stealing any chattel or fixture let to be used by him in or with any house or lodging, he is guilty of felony under the Larceny Act, 1861,[2] and is liable to imprisonment with or without hard labour for two years, or if the

[1] *West Ham Central Charity Board* v. *East London Waterworks Co.*, [1900] 1 Ch. 624, in which the definition of Waste was discussed at great length.

[2] 24 & 25 Vict. c. 96, s. 74.

value of the chattel or fixture exceeds £5, to penal servitude for not more than seven years or less than three years, or to imprisonment.

Voluntary waste may also be committed by altering the character of the property, even though such alteration improves it, *e.g.*, by adding a new wing to a house, or converting a brewery worth £120 per annum into houses worth £200 per annum, or pulling down an old house and re-building it in an improved fashion. Such waste is termed **Meliorating** or **Ameliorating waste**, but practically the reversioner has no remedy if it is committed, unless he can prove injury to the reversion, which is improbable: and an injunction to restrain meliorating waste will not be granted if no injury to the reversion is threatened.[1]

(*b*) **Permissive waste** is a mere passive act of *omission* or neglect, as when a tenant allows parts of a building to decay from want of paint; or to fall for want of structural repairs; or if the roof becomes defective, allowing rain to enter and cause damage to the interior; or if a fence decays whereby deer in a park are dispersed; or if a sea or river wall falls into disrepair, and meadows and marshes are surrounded by water and become unprofitable.

(2) **Equitable waste** is waste of an extravagant or gross character, such as wilful or malicious damage to the property, *e.g.*, pulling down the mansion-house, or cutting down timber planted or left for shelter or ornament, committed by a tenant who by the terms of his tenancy has been expressly exempted from

[1] *Doherty* v. *Allman*, (1878) 3 App. Cas. 709; 39 L.T. 129; *Meux* v. *Cobley*, [1892] 2 Ch. 253.

liability in respect of both voluntary and permissive waste. Such a tenant is said to hold *without impeachment of waste*. In practice the only tenants who ever thus hold, are tenants for life when the deed of settlement under which they hold, expressly states that the tenant holds without impeachment of waste, that is to say, he is not liable for either voluntary or permissive waste. Before the passing of the Judicature Act, 1873,[1] the Courts of Law and Equity were separate, and the Courts of Law had no power to restrain waste when the tenant had been expressly made unimpeachable for waste.

The Courts of Equity, however, had power to do so, hence such waste was called "equitable," the term being derived from the name of that Court, and it does not imply that such waste was *equitable* in the ordinary sense of the word, viz., just, or fair.

Since the passing of that Act both the King's Bench Division and the Chancery (the old Equity) Division of the High Court of Justice have equal jurisdiction, and either division can restrain equitable waste, so that the distinction is no longer important, although the expression has been retained to distinguish such waste from that committed by ordinary tenants for life or for years, who are impeachable for voluntary waste.

By the Judicature Act, 1873, Section 25 (3), "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an

[1] 36 & 37 Vict. c. 66.

intention to confer such right shall expressly appear by the instrument creating such estate." Therefore if it is intended to give the tenant for life without impeachment of waste a right to commit "equitable" waste, it must be expressly mentioned, otherwise the Courts will restrain such waste.

In an action to restrain the cutting of timber, on the ground of equitable waste,[1] it was held that the question to be decided was whether the timber was in fact planted or left for ornament or shelter, not whether it is ornamental or useful for shelter, and the Court will accept the evidence of forestry experts or other competent persons, founded on inference from the present appearance and condition of the timber, as some evidence that it was so planted or left.

If chalk, gravel, or other pits or mines were opened before a tenant entered, it is no waste for him to dig them for his own use, and he is entitled to do so; for it amounts merely to taking the profit of the land.

Neither does a tenant's common law liability for waste extend to repairing damage which is the result of the act of God, such as earthquake, storm, lightning, etc., nor to damage caused by accidental fire, but if the fire was intentionally lighted or was the result of the tenant's negligence he will be liable for waste. The tenant, however, cannot require the landlord to repair or rebuild unless the landlord has expressly agreed to do so, or unless the house comes within the provisions of the Housing and Town

[1] *Weld-Blundell* v. *Wolseley*, [1903] 2 Ch. 664.

Planning, etc., Act, 1909.[1] But, as will be shown later, where the tenant has unconditionally agreed to repair, he will be bound to do so, whatever may have been the cause of the damage.

Injury to or destruction of a building, resulting from its use by a tenant in a reasonable and proper manner for the purpose for which it was let, is not waste. For instance, where a grain warehouse had been let to a tenant, and shortly afterwards, owing to the weight of the grain, a beam which supported one of the floors broke, and ultimately the external walls sank and bulged, it was held that the tenant had not been guilty of waste.[2]

In **Agricultural tenancies** it seems that it is not waste at common law to leave land uncultivated,[3] but the "custom of the country" is assumed to be incorporated in the lease, unless expressly excluded or unless the lease contains covenants inconsistent with that custom, and there is an implied covenant on the part of the tenant to cultivate a farm in a husbandlike manner, and subject to the Agricultural Holdings Act, 1908, according to the custom of the country.

Ploughing up an old meadow and converting it into arable land is waste,[4] but where a tenant had agreed "not to commit any waste or spoil" and not to break up any "pasture lands," and during the last year of his tenancy he ploughed up pasture which he

[1] See *post*, p. 42.

[2] *Saner* v. *Bilton*, (1878) 7 Ch.D. 815; 47 L.J. Ch. 267.

[3] *Hutton* v. *Warren*, (1836) 1 M. & W. 472.

[4] *Simmons* v. *Norton*, (1831) 5 M. & P. 645.

himself had sown and mowed for fourteen consecutive years, although before he entered into the agreement the land had regularly been ploughed by him, it was held that he was not guilty of waste, "pasture lands" being held only to apply to such land as was pasture land at the date of the agreement.[1]

By Section 26 (1) of the Agricultural Holdings Act, 1908,[2] except in the last year before the expiration of the tenancy, a tenant is entitled to practise any system of cropping of arable land, and to dispose of the produce of the holding in any manner he chooses, notwithstanding any custom of the country or contract in the lease to the contrary, provided that the tenant has made adequate provision to protect the land from injury or deterioration. The liability of agricultural tenants is considered in Chapter XV.

LIABILITY OF DIFFERENT TENANTS FOR WASTE WHEN THERE ARE NO EXPRESS REPAIRING COVENANTS IN THE LEASE.

When land or buildings are let to a tenant it is the duty of the tenant to use and enjoy the same in such a way that the reversion is not injured.

Tenants at will, Tenants on sufferance, Tenants by *elegit*, Tenants from year to year and Tenants for life, are all liable for Voluntary Waste, but these tenants are not liable for Permissive Waste.

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1 *Rush* v. *Lucas*, [1916] 1 Ch. 437; 101 L.T.R. 851.

2 8 Edw. VII., Ch. 28.

If a **Tenant at will** commits waste he thereby in effect determines his tenancy, and his landlord can bring an action against him for trespass. Neither a tenant at will nor a tenant on sufferance is liable for permissive waste, owing to the uncertainty of their holdings.

A Tenant by elegit is for the same reason not liable for permissive waste as, if his debt is paid, he has no right to continue in possession of the land.

Tenants from year to year being in former times considered only as tenants at will, are not liable for permissive waste except in so far as they are obliged to keep premises wind and watertight; they are not liable to make good mere wear and tear of the premises.[1] Tenants for shorter periods are, in the same way, only liable for voluntary waste.

Tenants for years almost invariably hold under written leases which contain covenants to repair, so that questions seldom arise as to their liability for waste as distinct from breach of such covenants. A tenant for years has been held liable for both voluntary and permissive waste,[2] and it seems he is liable to his landlord, or the latter's assignee, for waste committed or permitted by himself or by others, and his liability will continue should he hold over after the expiry of a notice to quit.

An assignee of a term of years will be liable for both voluntary and permissive waste to the reversioner or to the assignee of the reversion, in the same

[1] *Torriano* v. *Young*, (1833) 6 C. & P. 8.

[2] *Davies* v. *Davies*, (1888) 38 Ch.D. 499.

way as the original tenant was liable, but after the assignee of a term assigns his interest to another his liability will cease.

Tenants for life are not liable for permissive waste,[1] but are liable to the remainderman for voluntary waste.

If the tenant for life holds *without impeachment of waste* he is only liable for "equitable" waste, as already explained. He will then be entitled to cut timber (except ornamental), open mines and do acts which would otherwise amount to voluntary waste, and for which he would consequently have been liable.

If the deed of settlement expressly so provides, the tenant for life may even be allowed to commit equitable waste.

If the tenant for life is impeachable for waste he is not allowed to cut timber, except for thinning purposes, unless the estate is a "timber" estate,[2] *i.e.*, an estate from which income has been regularly derived from the periodical felling of timber trees.

Formerly an ordinary tenant for life, since he is liable for voluntary waste, had no right to cut timber even if it were decaying or overcrowded, unless he obtained the sanction of the Court, but now, by the Settled Land Acts, 1882-1890, if there is timber on the estate ripe and fit for cutting, he may, on obtaining the consent of the trustees of the settlement, or an Order of the Court, cut and sell such timber, but three-quarters of the net proceeds of the sale are to be set aside as capital money, the tenant for life being entitled to the remaining quarter as his profit.

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[1] *Avis* v. *Newman*, (1889) 41 Ch.D. 532.

[2] *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

A tenant for life may, however, unless restrained by covenant or agreement, cut wood for fuel to burn in the house and for repairing the house, fences, or implements of husbandry. He may also cut underwood, and lop pollards (*i.e.*, trees which have had their tops cut off).

A tenant for life must not dig for gravel, brick, or stone, except in such pits as were open and usually dug when he came into possession. Nor must he open new mines for coal or other minerals, nor cut turf on bog lands for sale, but he may continue working existing mines, or cut turf on bog lands previously used for that purpose.

Copyholders are liable for both permissive and voluntary waste. If owing to their act or neglect buildings decay, or land is flooded, etc., their tenements are legally forfeitable to the lord of the manor. Forfeiture can also be obtained for such acts as ploughing up meadows, pulling down houses, opening and working mines, or felling timber contrary to the custom of the manor. In some cases, however, the copyholder may get relief from the Courts.

An executor of a tenant in fee simple or fee tail would be liable to the heir for voluntary waste while he (the executor) is in possession of the property, but apparently he would not be liable for permissive waste.

An executor of a leaseholder will, if he continues to hold the land, be liable for waste to the landlord to the same extent as the deceased tenant was liable.

A mortgagor is liable to a mortagee for voluntary waste, if such waste is to the detriment or injury of the mortagee, by lessening the value of the security for the money which the mortgagee has lent. When, however, the security is ample, a mortgagee cannot prevent the mortgagor cutting timber.

A mortgagee in possession is liable to the mortgagor for voluntary waste, but he may fell timber and may open new mines if his security is insufficient, assuming that the mortgagor was himself entitled to do so. Also by the Conveyancing and Law of Property Act, 1881,[1] in the absence of any covenant to the contrary in the mortgage deed, a mortgagee in possession is entitled to cut and sell timber ripe and fit for cutting and not planted or left standing for ornament. Such sale must, however, be completed within twelve months from the making of the contract of sale. When a mortgagee has improperly felled and sold timber the proceeds must be applied first in payment of the interest due and then in paying off the principal sum.

If the property mortgaged is leasehold and the mortgage deed is in the form of an assignment of the unexpired term the mortgagee in possession will be in the same position as his mortgagor was, viz., liable to the reversioner for both voluntary and permissive waste.

A Vendor is liable to a purchaser of land for breach of trust if he commits waste during the interval between the making of the contract of sale and completion of the conveyance, which in some cases

[1] 44 & 45 Vict. c. 41, s. 19.

may be a considerable time. The vendor should also prevent the land going out of cultivation, and he must take reasonable care that the property is not deteriorated during the interval. The purchaser, however, takes the risk of deterioration or dilapidations not attributable to the negligence or wilful act of the vendor, such as destruction of buildings by fire.

Tenants in common and **Joint tenants** are liable to each other for voluntary waste. If one joint owner lays out money in improvements or in repairs which are not absolutely necessary to preserve the property, he has no right of action against his co-tenant for a share of the cost.[1]

A Tenant in tail after possibility of issue extinct is in the same position with regard to waste as a tenant for life without impeachment of waste, viz., he is liable to the remainderman or reversioner for equitable waste, as on the death of the tenant in tail after possibility of issue extinct, the estate will pass to the remainderman or reversioner.

Tenants in fee simple and **Tenants in tail** have no liability for waste, since waste can only arise when one person is in temporary possession of land of which another is the present or future owner.

Both these tenants are owners of freehold estates of inheritance, and can therefore do exactly what they please with their land, so long as they do not thereby interfere with the rights of their neighbours or commit offences under the various Acts of Parliament relating to buildings, public health, etc.

[1] *Leigh* v. *Dickeson*, (1883) L.R. 12 Q.B.D. 194.

REMEDIES FOR WASTE.

In practice it is unusual for any dispute as to waste to arise, since when land or a house is let to a tenant, it is the almost invariable custom for the lease to contain some express agreement to repair or keep in repair, and the landlord can then sue the tenant for breach of this agreement.

At Common Law the liability for waste originally only extended to those tenants whose estates were created by operation of law, such as tenants by the curtesy [1] and tenants in dower,[1] but in the thirteenth century two Acts of Parliament were passed which extended the liability for waste to tenants for years and tenants for life.

The Statute of Marlborough [2] enacted that: "Farmers during their terms shall not *make waste* . . . without special licence had by writing of covenant making mention that they may do it; which thing if they do and thereof be convict, they shall yield full damage by amerciament grievously." "Amerciament" is a fine assessed by a jury instead of being, as is usually the case, fixed by the Court or by Statute.

The Statutes of Gloucester [3] made tenants for life or for years liable under a *writ of waste*, and provided that if found guilty they should forfeit their land and pay three times the value of the waste which had been committed. But this part of the Statutes dealing with waste has been repealed by the

[1] See Chapter I.

[2] 52 Henry III. c. 23, s. 2.

[3] 6 Edw. I. c. 5.

Civil Procedure Acts Repeal Act, 1879,[1] and consequently this remedy no longer exists. As the result of different decisions given while the Statute of Gloucester was in force, and also of a later one,[2] it appears that tenants for years are liable for both voluntary and permissive waste, but tenants for life are only liable for voluntary waste.

Formerly it seems these Statutes would have made a tenant liable for damage by fire, but by an Act of Parliament passed in 1774,[3] tenants were relieved from liability for accidental fire, unless they had expressly agreed to repair unconditionally. The liability for damage by fire is dealt with in a later chapter.

The Statute of Marlborough has little practical importance at the present time, since, as already stated, there are generally express covenants in every lease, by which the tenant's liability to repair is clearly defined.

When voluntary waste is wantonly and maliciously committed, with the intention of destroying the premises, such as breaking the windows, burning the doors or staircase, etc., it is dealt with by the criminal law under the Malicious Damage Act, 1861.[4] By this Act, if a tenant for years or any less term, or at will, or holding over after the termination of any tenancy, unlawfully and maliciously pulls down

[1] 42 & 43 Vict. c. 59.

[2] *Davies* v. *Davies*, (1888) 38 Ch.D. 499.

[3] 14 Geo. III. c. 78.

[4] 24 & 25 Vict. c. 97, s. 13.

or begins to pull down and demolish any dwelling house or building, or any part thereof, or unlawfully and maliciously pulls down and severs any fixture, such tenant is guilty of misdemeanour and is liable to a fine or imprisonment, or both.

In an arbitration under the Agricultural Holdings Act, 1908, in which a tenant is claiming compensation in respect of improvements or for breach of contract by the landlord, and the landlord has a claim against the tenant for waste wrongfully committed or permitted, he may, if he thinks fit, by notice to the tenant, require his claim for damages for waste to be determined by the arbitrator.[1]

Also, if the tenant has injured the holding by cropping arable land contrary to the custom of the country or contrary to express agreement, the landlord may, should he and the tenant fail to agree, claim to have the amount of damages settled by arbitration.[2]

If voluntary waste is committed, the reversioner can apply to the Court for an injunction to restrain the tenant from repeating or continuing the damage complained of, or he can bring an action to recover the amount of damage which the reversion has suffered. If the damage is slight and there does not appear to be any danger of the tenant repeating the injury, an injunction will probably not be granted. But where the damage resulting from voluntary waste is of a serious nature, the Court will grant

[1] 8 Edw. VII. c. 28, s. 6 (3). See Chapter XV.

[2] *Ibid.*, s. 26 (2).

one ; for instance, a tenant can be restrained from pulling down a house and building another which the landlord objects to, or from making material alterations in a dwelling-house, as by converting it into a shop or warehouse, or ploughing up meadow land, or removing "landlord's" fixtures, etc., etc. An injunction to restrain permissive waste will, however, not be granted.

An action for waste may be brought by a reversioner against the executor of a tenant any time "within six months after such executor or administrator shall have taken upon themselves the administration of the estate" (presumably this means six months from the date of the probate), provided the acts of waste were committed by the deceased tenant during the last six months preceding his death.[1]

The executor of a landlord may bring an action against a tenant any time within a year after the landlord's death, for acts of waste committed by the tenant during the last six months preceding the death of the landlord.[2]

These time limits do not apply to an action for breach of a repairing covenant contained in a lease.

The measure of damages for waste is the amount by which the value of the reversion is depreciated, less a discount for immediate payment.[3]

In the Metropolitan Police district, if a tenant or lodger wilfully and maliciously damages either the

[1] 3 & 4 Will. IV., c. 43, s. 2.

[2] *Ibid.*

[3] *Whitham* v. *Kershaw*, (1885) L.R. 16 Q.B.D. 613 ; 54 L.T. 124.

premises let to him or any furniture therein which does not belong to him, and complaint is made to a police magistrate within a calendar month of the commission of the damage, or of the end of the tenancy, such tenant or lodger shall pay to the landlord or party aggrieved such sum as the magistrate shall think reasonable, but not more than £15, as compensation for the damage done.[1]

[1] Metropolitan Police Courts Act, 1839, s. 38 (2 & 3 Vict c. 71).

CHAPTER III.

IMPLIED CONTRACT BY LANDLORD AS TO REPAIRS.

An implied contract or covenant is one which the law implies from the nature of the transaction, although not actually expressed by words in the written agreement. By the *Common Law* (see definition Chapter I.), in the case of letting an *un*furnished house or building, there is, in the absence of express agreement on the subject, no implied promise or warranty on the part of the landlord that it is fit for occupation, or for the purpose for which it is let, or that it will last till the end of the lease. Nor, in the case of land, does the landlord imply that it is fit for cultivation. The tenant takes the house or land as it stands, with all its defects. Even when the premises become dangerous or collapse altogether, or are burned down, there is no liability on the landlord to repair or rebuild; neither, with certain exceptions, is the landlord liable to the tenant or to anyone else who is injured owing to the lack of repair. "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract,

if any."[1] The tenant, however, will nevertheless have to continue paying rent until the end of the lease. He has been held liable to do this even where, owing to a defective drainage system, sewer gas entered the house and rendered it dangerous to health,[2] but the Local Sanitary Authority can compel the landlord to rectify defects of this kind unless the tenant has agreed to pay such expenses. If the landlord sues the tenant for rent, it is no defence for the tenant to allege that the landlord is under some implied contract to repair the premises, and that, owing to his neglect, they have become useless to the tenant.[3] This, however, would not apply when the implied contract arises by Statute.

It will be apparent how important it is, in the absence of some warranty by the landlord as to the condition of an unfurnished house, for an intending tenant to have the house carefully examined and reported on by a surveyor or builder, before taking it, even if in the proposed lease the tenant is not going to undertake to keep the premises in repair, as he is usually required to do. If the tenant fails to satisfy himself as to the condition of a house, he may incur most serious liabilities, especially if the proposed lease is a long one, or if the premises are old or "jerry" built. If the lease contains repairing covenants the tenant may even have to rebuild the house if it falls down or is burnt down, as will be seen in a subsequent chapter; and, should the lease not contain repairing

[1] Per Erle, C.J., *Robbins* v. *Jones*, (1863) 15 C.B. (N.S.) 221.

[2] *Bartram* v. *Aldous*, (1886) 2 T.L.R. 237.

[3] *Surplice* v. *Farnsworth*, (1844) 7 M. & G. 576.

covenants, the tenant may be saddled with a house in which he is unable to live, and, although still liable for the rent, he will have no claim against the landlord.

It must be remembered that the foregoing principles have been established by the Common Law. In certain cases considerable alterations have been made by Statute, as will be seen later; also, the landlord may make himself responsible by express contract.

FURNISHED HOUSES.

Where a furnished house or furnished apartments are let there is an implied contract on the part of the landlord that at the time of the letting, the premises are reasonably fit for habitation, and, if they are not so, the tenant is entitled to quit without notice. This was so held in a case where, owing to defective drains, bad smells occurred in the basement of a furnished house.[1]

The tenant on noticing the offensive smells at once declined to occupy the house, and although, in three weeks, the landlord remedied the defects, it was held that the state of the house at the beginning of the tenancy entitled the tenant to rescind his contract, and that he was not liable for the agreed rent, or for use and occupation of the premises.

This was also held where a furnished house was found to be infested with bugs,[2] and in another case where the house was infected by measles.[3]

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[1] *Wilson* v. *Finch-Hatton*, (1877) 2 Ex. D. 336.

[2] *Smith* v. *Marrable*, (1843) 11 M. & W. 5.

[3] *Bird* v. *Greville* (*Lord*), (1884) 1 C. & E. 317.

There is, however, no implied contract on the part of the landlord that a furnished house or apartments shall continue fit for occupation during the term of the letting, and, if they are subsequently found unfit for habitation, the tenant will not be released from his agreement.[1]

LIABILITY OF LANDLORD FOR NEGLECT TO REPAIR.

Akin to an implied contract to repair by the landlord is his liability to his tenants and others for negligence, if he retains control over part of the premises, and owing to its disrepair a tenant suffers damage. For instance, when parts of a building are let in flats or chambers to different tenants, and the landlord keeps the remaining portions, including the foundations, roof, staircase, entrance hall, lifts, main drains, etc., under his control. Under these circumstances the landlord impliedly undertakes to keep these portions in repair; and if a tenant, or anyone not a tenant, being lawfully upon the premises, suffers injury (*e.g.*, by slipping on a defective stair) owing to the landlord's neglect to keep in a proper state of repair the part of the building which is under his control, the landlord will be liable for damages.[2] The liability of the landlord and of the tenant to third persons will be considered in a later chapter.

In another case the tenants occupied one floor in a building, and in consequence of a rain water gutter (the possession and control of which was

[1] *Sarson* v. *Roberts*, [1895] 2 Q.B. 395.

[2] *Miller* v. *Hancock*, [1893] 2 Q.B. 177.

retained by the landlords) being stopped up, the water came in and damaged the tenants' goods. It was proved that the landlords never had the gutters or pipes examined or cleaned out, and that the rubbish which caused the stoppage was the accumulation of years. The tenants gave the landlords notice of the leakage, but they failed to have the gutter cleared out until after a lapse of four or five days from the receipt of the notice. The Court held that as the gutter was under the control of the landlords, it was their duty to take care that it was not in such a condition as to cause damage to the tenants, and that as they had received notice of its being stopped up and had neglected to clear it out within a reasonable time after the receipt of the notice, they were guilty of a want of due care and were consequently responsible for the damage done.[1]

But in a similar case[2] where rain-water from the roof was collected by gutters into a box in the upper part of a warehouse occupied by the landlord, and a hole had been gnawed in the box by a rat, causing the water to escape and damage the goods of the tenants of the ground floor, it was held that the landlord was not liable either on the ground of implied contract, or on the ground that he had brought the water to the box from which it was liable to escape, and from which it had, in fact, entered the warehouse, as it was found that the landlord had used reasonable care in examining and seeing to the security of the gutters and the box from time to time.

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[1] *Hargroves, Aronson & Co. v. Hartopp*, [1905] 1 K.B. 472.

[2] *Carstairs v. Taylor*, (1871) 6 L.R. Ex. 217; 40 L.J. Ex. 129.

In a later case[1] the facts were shortly these:—A building was let in flats, and before the tenant took his flat, water had been laid on to a cistern on the fourth floor, from which the tenant, who occupied the ground floor, received his water supply. The tenant was therefore taken to have assented to water being stored on the premises by the landlord. A leakage occurred from the cistern, and the landlord, on being informed of this, sent for a plumber to repair it. The plumber or his workmen were negligent in what they did, with the result that subsequently it was found that there had been a considerable escape of water, and the goods of the tenant were damaged. The tenant sued the landlord for damages, but was unsuccessful, it being held that the damage was not caused by the wilful default or neglect of the landlord, he having personally done all that he possibly could. He had employed a skilled plumber, and in consequence of the negligence of the latter or his workmen the damage occurred, and since the tenant had impliedly assented to the storage of water on the premises, the ordinary rule that a person is not responsible for the negligent act of an independent contractor applied, and consequently there was no negligence on the part of the landlord, and he was not liable.

Neither, in a similar case,[2] was a landlord held liable for a breach of covenant for quiet enjoyment, where a tenant occupied a ground floor flat to which water was laid on from a cistern at the top of the building. A branch pipe on the floor above suddenly

[1] *Blake* v. *Woolfe*, [1898] 2 Q.B. 426.

[2] *Anderson* v. *Oppenheimer*, (1880) 5 Q.B.D. 602; 49 L.J.Q.B. 708.

burst, and water poured down into the tenant's flat and injured his goods. The jury having found that the branch pipe when fixed (which was before the lease) was a reasonably fit and proper one for the purpose for which it was fixed and intended, and that there was no negligence or want of skill in the fixing and maintaining of the pipe where it was, the Court held that the tenant had no cause of action for breach of the covenant for quiet enjoyment, because the covenant was prospective and there had been no act of omission or commission during the lease, causing an interruption of quiet enjoyment. Also, that the apparatus for the water supply was for the common benefit of the tenant and the other tenants of the flats, and consequently he had no claim against the landlord for having stored water which was liable to escape, and had, in fact, done so and caused damage, and for which the landlord would have been liable had the tenant not impliedly assented to the water being stored on the premises.

THE LIABILITY OF A LANDLORD BY STATUTE.

By Statute, under the various Acts of Parliament relating to the Housing of the Working Classes, the obligations of the landlord as to repairs have been gradually extended until, at the present time, they are decidedly heavy, and in the absence of further legal decisions are still somewhat undefined. The most recent Act, the **Housing and Town Planning, etc., Act, 1909,**[1] is an extension of the Housing of the

[1] See sections of Act in Appendix.

Working Classes Acts, 1890-1903, and, with regard to repairs, the liability of the landlord is as follows:—

If the rent of a house, *let after the passing of the Act*,[1] does not exceed £40 a year within the Administrative County of London; £26 a year in Boroughs or Urban districts with a population exceeding 50,000; and £16 a year elsewhere in England and Wales, and Scotland, there is an **implied contract by the landlord** (except where the house has been let for a term of at least three years certain, and the tenant has in his lease agreed to put the house into a reasonably fit state of repair) **that the house is, in all respects, reasonably fit for human habitation;** and the landlord must keep it in that state during the whole of the tenancy. Any agreement to the contrary between the landlord and tenant will be void.[2] If the landlord fails to repair, after notice from the Local Authority, they may do the necessary work at his expense, subject, however, to the landlord's right of appeal to the Local Government Board.

By this Act the landlord is given a right to enter and view the state of repair of a house of the above class, at reasonable times of the day, on giving twenty-four hours' notice to the tenant.

It will be seen how extensive is the scope of the Act, since the rent of £40 a year in London includes that of a vast number of houses in the suburbs, the tenants of which are certainly not members of the working classes; and the expression "in all respects reasonably fit for human habitation" is decidedly wide, and

[1] 3rd December, 1909.

[2] Under Sec. 12, Housing of the Working Classes Act, 1903 (3 Edw. VII., c. 39).

difficult to define, until there have been some further judicial decisions in regard to the interpretation of the Act.

In a recent case[1] tried before Mr. Justice Scrutton and a jury, the tenant sued his landlord and recovered £50 damages for personal injuries sustained through a breach of the implied contract under the above Act. While the tenant was sitting outside an upstairs window of his house, and cleaning the glass, the sash gave way, and he fell, sustaining severe injuries.

In another case[2] a tenant under the Act received £5 5s, damages from his landlord owing to the house being infested with bugs.

Under the **Housing of the Working Classes Acts, 1890-1903**[3] (which still apply to houses let *before* the passing of the Housing and Town Planning, etc., Act, 1909), in the case of a house or part of a house let after August 14th, 1885, at a rent not exceeding £20 in London; £13 in Liverpool; £10 in Manchester and Birmingham; £8 elsewhere in England; and £4 in Scotland and Ireland, there is an implied contract by the landlord that the house is, at the commencement of the tenancy, in all respects reasonably fit for human habitation, notwithstanding any agreement to the contrary between the landlord and the tenant.

[1] *Schnell* v. *Chamberlain*, (1911) unreported.

[2] Reported in *The Times* 26th July, 1911, p. 15.

[3] 53 & 54 Vict. c. 70, s. 75; 3 Edw. VII., c. 39, s. 12.

Under the **Agricultural Holdings Act, 1908,**[1] First Schedule, Part III. (27), an agricultural tenant is entitled to compensation for "Repairs to buildings, being buildings necessary for the proper cultivation or working of the holding, other than repairs which the tenant is himself under an obligation to execute :

Provided that the tenant, before beginning to execute any such repairs, shall give to the landlord notice in writing of his intention, together with particulars of such repairs, and shall not execute the repairs unless the landlord fails to execute them within a reasonable time after receiving such notice."

DEFECTIVE DRAINS, DANGEROUS BUILDINGS, Etc.

In the event of a nuisance arising from premises becoming insanitary, the Local Authorities have power under the Public Health Acts and under the Housing of the Working Classes Acts, 1890-1909, to require the landlord to abate such nuisance.

Under the London Building Acts, and under the Public Health Act, 1875, the cost of pulling down or shoring up a dangerous building can in certain cases be recovered from the landlord.

As to whether or not the landlord has transferred his statutory liabilities under the above Acts to the tenant depends on the wording of the express covenants of the lease, and these, and the liabilities of both parties under those Acts will be considered in a subsequent chapter.

[1] 8 Edw. VII., c. 28.

CHAPTER IV.

IMPLIED CONTRACT BY TENANT AS TO REPAIRS.

As stated in a previous chapter, when land or buildings are let to a tenant, it is the duty of the tenant to use and enjoy the same in such a way that the reversion is not injured; in other words, a tenant is liable for waste.

As a corollary to this liability, *in the absence of any express stipulation* (but not otherwise), there is *implied* by law an undertaking on the part of the tenant to use the demised premises in a proper and tenantlike manner; or, in the case of land, to cultivate it in a good and husbandlike manner according to the custom of the country.

If there be in the lease an express stipulation to repair, this will govern the liability of the tenant, and no undertaking, even to use the premises in a tenantlike manner, will be implied,[1] since the express stipulation will override any implied covenant.

In the case of a **tenancy at will** there is no liability upon the tenant to repair dilapidations resulting from permissive waste, but he will be liable if he commits voluntary waste. In the case of a person enjoying the

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[1] *Standen* v. *Christmas*, (1847) 10 Q.B. 135.

use of premises rent free for over twelve years as a tenant at will, it has been held that the entry of the landlord to effect repairs, without objection from the tenant, did not amount to an interruption of the tenancy so as to prevent the acquisition of an absolute title to the property by the tenant, under the Statutes of Limitations.[1]

A **copyhold tenant** is theoretically a tenant at will. He may be held responsible to repair under a custom of the manor; for instance, it was held that a copyhold tenant and his under-tenant were liable to distraint for neglect to repair the premises.[2] The obligation of copyhold tenants to repair was considered in a recent case.[3] There the lord of a manor alleged a custom of the manor imposing upon the copyholders an obligation to keep their holdings in tenantable repair. For breach of this alleged obligation by a deceased copyholder in his lifetime, the lord brought an action for damages against the executors, upon an implied contract to perform it. He produced entries in the court rolls, and other evidence in support of his case, but it was held that this evidence, being referable to the customary law common to all copyhold tenure, whereby a copyhold tenant is liable to forfeiture for waste, was no evidence of any custom imposing on the copyholders a liability from which a contract to keep their holdings in tenantable repair was to be inferred.

Tenants from year to year were not considered as "tenants for years" within the meaning of the Statutes

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[1] *Lynes* v. *Snaith*, [1899] 1 Q.B. 486.

[2] *Thorne* v. *Tyler*, (1641) Mar. 161.

[3] *Galbraith* v. *Poynton*, [1905] 2 K.B. 258.

of Gloucester, consequently they are not liable to repair the results of permissive waste, except to this limited extent:—in the absence of any express stipulation in the lease as to repairs, etc., they are bound to use the premises in a tenantlike and proper manner, and to keep the premises wind and water tight. They are, however, liable for damage caused by voluntary waste. A tenant from year to year would only appear to be bound to execute such repairs as are necessary to prevent the incursion of the elements, *e.g.*, patching up a leaking roof so as to prevent decay of the premises. He need not effect lasting or substantial repairs such as new roofing; and in the case of broken glass, etc., it will probably be sufficient fulfilment of his implied undertaking, if he boarded up or pasted brown paper over the broken pane, provided such method will keep out the weather. A tenant from year to year is not liable by implied contract to make good mere wear and tear of the premises. Although this is the legal position of a yearly tenant, the custom in London appears to be quite the contrary, where such a tenant invariably expects the landlord to do all repairs, and the tenant will not, as a rule, undertake to do any himself. In the case of an agricultural tenancy, a yearly tenant impliedly undertakes to use his farm in a husbandlike manner, according to the custom of the country. See Chapter XV.

The question as to the liability of a **tenant for years**, on an implied contract to repair, has seldom been raised in the courts, as leases for terms of years invariably contain express covenants as to repairs; but since such tenants have been held to be liable for both voluntary and permissive waste it seems that their implied

liability to repair is legally almost as great as when they are under express covenant to repair, except that they would not be liable to repair or rebuild premises destroyed by storm, or the act of God, or by accidental fire, as they would be in the case an unconditional express covenant. Neither would they be liable for purely decorative repairs, except where paint is necessary to prevent decay.

A mortgagee in possession is not liable for deterioration of the property owing to decay due to the effect of time, nor even for want of repair. At the same time it is his duty to keep the premises in repair so far as the rents and profits in his hands will admit of, after deducting the interest to which he is entitled under the mortgage. Naturally, it is to his interest to maintain his security, but he is not bound to spend his own money on repairs, and if he does so he can recover the cost of necessary repairs from the mortgagor. The mortgagee is, however, liable for gross or wilful negligence in this respect,[1] especially when the mortgaged property is leasehold and the neglect to repair renders the lease liable to forfeiture. For instance, when a mortgagee entered into possession of unfinished leasehold buildings, and he neither sold the property nor completed the buildings he was held liable for wilful neglect;[2] but he is not bound to lay out money on the property except for necessary repairs.[3] He may pull down ruinous houses and build others in their stead,[4]

[1] *Taylor* v. *Mostyn*, (1886) 33 Ch.D. 226.

[2] *Perry* v. *Walker*, (1855) 24 L.J. Ch. 319.

[3] *Godfrey* v. *Watson*, (1747) 3 Atk. 518; *Sandon* v. *Hooper*, (1843) 6 Beav. 246.

[4] *Hardy* v. *Reeves*, (1799) 4 Ves. 466.

but it is inadvisable for him to carry out substantial repairs not strictly necessary, or to make lasting improvements without the consent or acquiescence of the mortgagor. It has been held that when he has done so, and it is proved that the value of the property has thereby increased, he is entitled to be repaid by the mortgagor.[1] The improvements, however, must not be of such a character as to increase the amount of the mortgagor's debt unduly, and thus make it difficult for him to redeem. A mortgagee is not, as a matter of course, entitled to interest on the money he has expended on repairs, but in some cases it has been allowed him on expenditure on necessary repairs and lasting improvements.

LIABILITY ON ASSIGNMENT.

When land is let by lease under seal, all implied covenants "run with the land," and also "run with the reversion," but not if the lease is not under seal. A covenant is said to run with the land or with the reversion, when either the liability to perform it, or the right to take advantage of it, passes to the person to whom the land is transferred. The implied covenant to repair is therefore a covenant running with the land and with the reversion. An **assignee of a term of years** is bound to perform, and is liable to be sued by the original landlord or by the latter's assignee, on all covenants which run with the land, but his implied liability ceases when he assigns his whole interest in the property to someone else, even

[1] *Shepard v. Jones*, (1882) 21 Ch.D. 469.

to a "man of straw" (*i.e.*, a worthless person without means). There is, however, an implied undertaking on the part of each successive assignee of a term of years to indemnify the original tenant against breaches of covenant committed by such assignee after the date when the property has been assigned to him, but before he has assigned it to someone else, and even though the assignee has never actually entered into possession of the property; and, of course, the assignee will remain liable to his immediate assignor under any express covenant which he has entered into in the deed of assignment between his immediate assignor and himself. The under-tenant of an assignee is, however, not bound to indemnify the original tenant in respect of rent or damages for breach of covenant which the tenant has, under the covenants in his lease, been compelled to pay to the landlord, as there is no privity of contract or of estate between the original tenant and the under-tenant of his assignee.[1] The assignee of a term may be sued on covenants which run with the land, although he may not actually have taken possession,[2] and it seems that the original tenant is not liable to be sued on his implied covenants after he has assigned, although, as will be shown in a later chapter, he remains liable on his *express* covenants.

A mortgagee of leasehold property "by assignment" is liable to perform the covenants which are obligatory upon an ordinary assignee, whether he be in possession or not. This liability is usually avoided by the mortgage deed being in the form of an under-

[1] *Bonner* v. *Tottenham, etc., Building Society*, [1899] 1 Q.B. 161.

[2] *Walker* v. *Reeves*, (1780) 2 Doug. 461 n.

lease instead of an assignment, in which case, as explained above, since there is no *privity* between the mortgagee, as under-tenant, and the original landlord, the mortgageeis not bound by the covenants contained in the original lease.

CHAPTER V.

EXPRESS CONTRACT BY LANDLORD AS TO REPAIRS.

It is not usual for the landlord to expressly undertake, in a lease, responsibility for any repairs, especially if the lease be a long one. When the landlord does agree to repair, the tenant should see that such agreement is embodied in the lease or agreement, as otherwise he will have no remedy should the landlord fail to execute the repairs, unless the case falls within the landlord's statutory obligation to repair, as explained in Chapter III.

The landlord's liability (if any) will rest entirely on the exact words used in the lease, and in any case the landlord will be entitled to notice of the lack of repair before the tenant can bring an action for breach of covenant.[1] Frequently in short tenancies (*e.g.*, under a yearly or a three years' agreement), and occasionally in longer leases, the landlord "agrees to keep all the external parts of the premises other than the windows and doors in good repair"; and if he agrees to insure against fire he will generally agree to expend the insurance money in rebuilding.

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[1] *Makin* v. *Watkinson*, (1870) 23 L.T. N.S. 592.

In the following case[1] a tenant brought an action against her landlord to recover the cost of repairs occasioned by a structural defect in the drains, whereby the basement of a house was flooded with sewage. The landlord had, in a three years' agreement, contracted to keep the roof, main walls, main timbers, drains and sewers in good tenantable repair during the tenancy, and had reserved a right to enter the premises and view the state of repair. The tenant, at her own expense, had the drains repaired, but did not, until three months after the damage, inform the landlord of the occurrence. She subsequently brought an action to recover the cost of repairs. The jury found that neither party knew of the defective condition of the drains before the damage occurred, although the landlord had the means of knowing. Mr. Justice Wills held that the agreement did not extend to the rectification of a structural defect, but only to *repairs*, and was not intended to impose the obligation to make alterations, however desirable in system or plan. He gave judgment for the landlord on the ground that notice of the defects complained of was essential before there could be a breach of covenant by the landlord. This decision was upheld by the Court of Appeal.

In the course of his judgment, Mr. Justice Wills stated: "If in a case of instant necessity like the present, the landlord did not act very promptly, the tenant would then be justified in treating the covenant as broken and doing the repairs himself, but it seems in the highest degree unreasonable that the tenant should be able to do such repairs, extending over three weeks,

[1] *Hugall* v. *McLean*, (1885) 53 L.T. 94; Cab. & E. 391.

without any notice at all to the landlord, and then hold him liable, whatever might have been spent upon the work."

In a recent case,[1] where the landlord had covenanted "at all times during the said term to keep the outside of the said premises in good and substantial repair," it was held that there was no breach of the covenant until the landlord had notice of the want of repair, even although he had, in the lease, reserved a right to enter and view the state of repair. It was also held that, under this covenant, the tenant could not require the landlord to rebuild a triangular-shaped corner house, most of which, owing to age (the house being about 200 years' old) and the effect of the elements upon the bricks and mortar, had been condemned and pulled down by the London County Council under the London Building Acts, as being a dangerous structure. Until notice was served by the London County Council neither the landlord nor the tenant knew of the dangerous state of the building, and its condition was not due to any neglect on the part of the landlord. It was impossible to repair the building and nothing could be done but rebuild it. Applying to this case the principle laid down in an earlier one,[2] that a *tenant* is not required, under a covenant to repair, to give back to his landlord at the end of the lease a different thing from that which he took when he entered into the covenant, Mr. Justice Warrington held that there had been no breach of the landlord's covenant to repair, and consequently he was not liable, having only agreed to keep the outside in *repair*.

[1] *Torrens* v. *Walker*, [1906] 2 Ch. 166.

[2] *Lister* v. *Lane & Nesham*, [1893] 2 Q.B. 212.

In some cases the landlord agrees to put the premises into tenantable repair before the commencement of the tenancy, and when this agreement is embodied in a lease in which the tenant covenants to keep the premises in repair afterwards, the tenant will not be liable, under his covenant, for the non-repair of any part of the premises until the landlord has first put them in repair; execution of the repairs by the landlord being a condition precedent to the tenant's liability.[1]

If the landlord covenants with his tenant that he will, should the premises be burnt down or damaged by fire, "rebuild and replace the same in the same state as they were in before the happening of such fire," he is only bound to restore the premises to the state in which they were when he let them, and is not bound to rebuild any additional parts which have been erected by the tenant.[2]

In a case were the landlord covenanted to repair and keep in repair all the external parts of the demised premises except the glass and lead of the windows, and in consequence of the adjoining house being pulled down the party wall was left exposed and without support, whereby it gave way, and the house became uninhabitable, it was held that the wall, even before the adjoining house had been removed, was an external part of the demised premises, and consequently the landlord was liable under his covenant to repair it, the external parts of premises being those which form the inclosure of them and beyond which no part of them extends.[3]

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[1] *Cannock* v. *Jones*, (1849) 3 Exch. 233.

[2] *Loader* v. *Kemp*, (1826) 2 C. & P. 375.

[3] *Green* v. *Eales*, (1841) 2 Q.B. 225.

The landlord had in this case refused to repair the wall, and the tenant consequently rebuilt it, and it was held that he was entitled to recover from the landlord the cost of doing so, the jury having found that this was the proper way of restoring it.

Even when the landlord has expressly covenanted to repair, the tenant cannot recover from him money which the tenant has paid for renting other premises during the progress of the repairs, although during that time the demised premises were not safely habitable.[1]

In a long lease it is not usual for the landlord to undertake any repairs, but in practice, in short tenancies, the landlord generally has to do external and internal repairs in order to preserve his property and to secure new tenants, and also because a tenant, in such tenancies, will not as a rule agree to do any extensive repairs.

If the landlord expressly contracts to repair, and neglects, after due notice, to do so, it seems that the tenant is justified in doing the repairs himself and deducting the cost from the rent[2]; or, if the landlord brought an action to recover the rent, the tenant could counterclaim for such expenses. It would not, however, affect the landlord's right to distrain for rent; neither would the tenant be entitled to quit because the landlord had failed to repair, but he could, after due notice, sue the landlord for breach of covenant.

When there is an express covenant by the landlord to repair, a license (by the tenant) to the landlord to enter upon the premises for a reasonable time, for the purpose of executing the necessary repairs, s implied.[3]

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[1] *Green* v. *Eales*, *ante*.

[2] *Taylor* v. *Beal*, (1591) Cro. Eliz. 222.

[3] *Saner* v. *Bilton*, (1878) 7 Ch.D. 815; 47 L.J. Ch. 267.

A landlord who has assigned his reversion remains liable to his tenant on express covenants contained in a lease under seal.[1]

WARRANTY.

While dealing with express contracts by the landlord to repair, it will be convenient to consider his liability as to repairs under a representation or warranty given either by himself or his agent. It is therefore advisable for the surveyor when asked by a prospective tenant as to the state of repair or as to drains, etc., to reply to such inquiries in writing, and to be careful not to give any sort of warranty without the express instruction of his principal. It is necessary to consider what constitutes a warranty in law, and what amounts to a mere representation. To create a warranty, no special form of words is necessary; neither need it be in writing. "It must be a collateral undertaking forming part of the contract, by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it."[2] If there is a mere verbal representation as to the condition of a house or drains, without fraud and made without authority, it seems that the landlord will not be liable.[3] In a similar case Lord Esher stated[4] that the jury must find the representations to be false and fraudulent, and if a person

[1] *Stuart* v. *Joy*, [1904] 1 K.B. 362.

[2] Per A. L. Smith, M.R., *De Lassalle* v. *Guildford*, [1901] 2 K.B. at p. 221.

[3] *Green* v. *Symons*, (1897), 13 T.L.R. 301.

[4] *Saunders* v. *Pawley*, (1886) 2 T.L.R. 590.

stated as being true that which he did not know to be true, and stated it recklessly, not caring whether it were true or not, and such statement was in fact untrue, the jury might find that the misrepresentation was fraudulent. The recklessness was evidence that the representation was fraudulent, but the jury must find it to be false and fraudulent.

In this case the landlord had made statements on the report of a sanitary inspector. There was no evidence that if the drains were defective, the landlord knew of it, or made the representations recklessly. And in another case [1] the tenants contended that they had been induced to take the lease on the representation of the landlord's agents that the premises were in a sanitary condition, and were in a good state of repair. The Court held that, assuming innocent representations were made which would entitle the tenants to put an end to the lease, they could not claim compensation for injuries sustained owing to the insanitary condition of the premises and occasioned by their entering into the lease.

But where a representation amounts to a warranty collateral to the lease, the landlord will be liable to the tenant for damages for the breach of such warranty. Thus, where a tenant and landlord were negotiating for a lease, and after terms had been arranged the tenant refused to hand over the "counterpart" that he had signed, unless he received an assurance that the drains were in order. The landlord virtually represented that they were in good order, and the counterpart was thereupon handed to him. The lease

[1] *Whittington* v. *Seale-Hayne*, (1900) 82 L.T. 49.

contained no reference to the drains, which were in fact not in good order. In an action brought by the tenant to recover damages for breach of warranty, it was held that the representation made by the landlord as to the drains being in good order was a warranty which was collateral to the lease, and for breach of which an action was maintainable.[1]

In another case[2] where a landlord let weekly property at 9s. a week, including rates and taxes, and by a letter stated that the premises should be "clean and ready for occupation" on a certain date, it was held that the landlord was liable to the tenant for damages owing to the tenant's illness caused by drinking water stored in a dirty cistern.

[1] *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215.

[2] *Stokes* v. *Gillet*, (1909) unreported.

CHAPTER VI.

EXPRESS CONTRACT BY TENANT AS TO REPAIRS.

When a lease is in writing it generally contains some reference to repairs. The liability on the tenant in this respect may amount to practically nothing, or it may be very heavy.

Naturally, when there is an express contract to repair, whether in a lease under seal or in an "agreement," the liability will depend entirely upon the wording of the covenant or clause, and the question of implied liability does not arise.

It will be necessary to consider how far the liability of the tenant extends in each case under the different contracts to repair, and what contracts are usually met with in the different classes of tenancy. The examples given are taken from actual leases.

(*a*) **Tenancy at Will.**—This class of tenancy seldom arises in practice, and when it does it is usually by verbal agreement. If, however, it is put into writing, the repairing contract would be very short, and the tenant would generally only agree to—

"Leave the premises in as good condition as the same are now in—reasonable wear and tear and accidents by fire explosion lightning flood and tempest only excepted."

(*b*) **Weekly, Monthly and Quarterly Tenancies.**—In these tenancies the tenant's liability to repair is

generally very slight, and the above contract, or the following, would be suitable :—

"To keep the said premises together with the appurtenances and landlord's fixtures in good condition and so to deliver up the same on the expiration or sooner determination of this agreement (fair wear and tear and damage by accidental fire excepted)."

(*c*) **Yearly tenancies and three years' agreements.** —The repairing contracts met with in these tenancies vary slightly, but in most cases "fair wear and tear" is allowed, except, perhaps, in the case of a house in the West End of London.

The following are a few examples :—

(1) "The tenant his executors or administrators shall and will during the period that he or they shall continue to occupy the said messuage or premises under this agreement keep repaired at his or their own expense all the windows window-shutters doors locks fastenings bells and all other landlord's fixtures in upon or belonging to the said premises and all the internal parts thereof and so leave the same at the end of the said term (reasonable wear and tear and accidents by fire flood or tempest only excepted)."

(2) "The tenant shall and will keep the interior of the said premises and all the glass in the windows and elsewhere in good and tenantable repair (fair wear and tear and damage by accidental fire explosion storm lightning or tempest only excepted) and will deliver up the same in such good and tenantable repair and condition (allowing for reasonable wear and tear) together with all landlord's fixtures at the expiration or sooner determination of the tenancy and also will preserve and keep the plantations lawns garden and grounds in good order and in a proper state of cultivation and will use his best endeavours to preserve the fruit trees and shrubs."

(3) "The tenant agrees to deliver up at the expiration or sooner determination of the said term the messuage with all fixtures attached thereto in as good repair and condition

as it now is in reasonable wear and tear and damage by fire excepted."

(*d*) **Leases under seal.**—In the case of a lease for a term, such as 5, 7, 14 or 21 years, it is usual for the tenant to undertake the whole of the repairs, both internal and external.

The following is a strict repairing covenant suitable for a 21 years' lease of a good class house in London, terminable (in this instance) at the end of the first seven or fourteen years :—

"AND also will at all times during the said term without being required to do so and as often as shall be necessary repair maintain glaze pave cleanse and keep the said premises and all erections or additions at any time hereafter to be erected thereon and all walls posts pales rails gates sinks sanitary and water apparatus drains pipes manholes offices and other appurtenances which shall belong to the said premises in good substantial and tenantable repair and the same in good substantial and tenantable repair deliver up to the lessor at the expiration or sooner determination of the said term AND in particular will paint with two coats at least of good oil colour and in a proper and workmanlike manner the outside wood and iron work of the said premises once in every three years of the said term and such parts of the inside of the said premises as are usually painted once in every seven years of the said term the last painting both outside and inside to be in the year immediately preceding the determination of this lease whether by effluxion of time or otherwise AND will at the same time with every outside painting restore and make good the outside stucco work wherever necessary and at the same time with every inside painting wash stop twice whiten or colour strip stop and repaper with paper of quality equal to the existing paper such parts of the inside of the said premises as are usually whitened coloured and papered AND ALSO will pay and contribute a fair proportion of the expenses of making repairing and securing all party and other walls gutters

sewers and drains belonging to the said demised premises in common with the adjacent premises AND ALSO will permit the lessor or his agent with or without workmen and others twice in every year during the said term at convenient hours in the daytime to enter into and upon the said demised premises and view and examine the state and condition thereof and of all such decays defects and wants of reparation as shall be then and there found to give to the lessee notice in writing to repair and amend the same within three calendar months then next following within which time the lessee will repair and amend the same accordingly AND ALSO will insure and keep insured the said demised premises from loss or damage by fire in the joint names of the lessor and lessee in the Assurance Company Limited or in some other well-established office to be approved of by the lessor in the sum of One thousand five hundred pounds at least and will pay all premiums and sums of money necessary for that purpose and will whenever required produce to the lessor or his agent the policy of such insurance and the receipt for every such payment and will cause all moneys received by virtue of any such insurance to be forthwith laid out in rebuilding and repairing the said premises and if the moneys so received shall be insufficient for the purpose will pay the deficiency out of his own moneys."

A shorter covenant suitable for a 21 years' lease would be as follows:—

"The tenant covenants to keep the exterior and interior of the demised premises and all additions thereto, and the boundary walls and fences thereof and the drains soil and other pipes and sanitary apparatus thereof in thorough repair and good condition and the same in good tenantable repair and condition to yield up to the lessor his heirs or assigns at the end or sooner determination of the said term. To paint with two coats at least of good oil paint in a workmanlike manner in every third year of the term and also in the last year thereof all the outside wood metal stucco and cement work usually

painted. To paint in like manner in every seventh year of the term and also in the last year thereof the inside wood and iron and other work usually painted and also to wash stop whiten distemper strip and paper all parts now whitened distempered and papered."

(*e*) **Building lease for 99 years.**—The repairing covenants are often very similar to those contained in the example given of a 21 years' lease, thus:—

"To keep the exterior and interior of the said dwelling-house when completed and all other buildings and erections which may at any time during the said term be erected on the land hereby demised and all additions to uch dwelling-house and buildings and the landlord's fixtures thereon and the yard garden walls fences drains and appurtenances thereof in good and substantial repair and condition."

This would be followed by a covenant to paint the outside at stated intervals as contained in the 21 years' lease, and also a covenant to yield up in repair as before described.

(*f*) **Building lease for 999 years.**—The following would be a very stringent form of repairing covenant. The tenant covenants:—

"At all times during the said term well and sufficiently to repair cleanse uphold maintain and keep in good tenantable repair the said messuage or dwelling-house messuages or dwelling-houses or other buildings and all additions thereto and the fixtures therein and the walls fences roads sewers drains and appurtenances thereof with all necessary reparations and amendments and when for that purpose the state of the premises either by decay accidents from fire or otherwise shall so require to take down the same messuage or dwelling-house messuages or dwelling-houses or other buildings and to rebuild and erect again on the said plot of land in such like good and substantial manner a similar messuage or dwelling-house

messuages or dwelling-houses or other buildings under the direction of the landlord or his surveyor or agent and so that there shall always during the said term be upon the said plot of land in such tenantable repair as aforesaid good and substantial buildings of the aggregate clear letting yearly value to a good tenant or tenants of £
at the least.

"At the determination of the tenancy to yield up the said messuage or dwelling-house messuages or dwelling-houses and all additions thereto and all landlord's fixtures affixed thereto in such repair and condition as shall be in accordance with the covenants hereinbefore contained."

(*g*) **Lease of a Farm for a term of years.**—The tenant covenants:—

"To repair and keep in repair the farm-house and buildings cottages and erections on the farm and to paint paper and whitewash when necessary and from time to time to tar such woodwork and coverings of buildings as may require so to be treated and to do all carting of material at his own expense, being provided by the landlord upon request with rough timber and other rough materials and lime tiles and bricks at the kiln and with paint tar and paper.

"To keep in repair all doors gates gate-irons posts rails hedges fences walls pumps stiles roads and bridges and to keep the hedges regularly brushed and trimmed and properly banked up and at proper seasons of the year to lay and plash such of them as require it and to plant young quick or thorns in the hedges where required and afterwards to properly guard and weed them from time to time and to keep the hedge bushes well faced up and backed up and not to remove fences or alter boundaries or landmarks.

"To clean out and keep open and free and in working order all ditches gutters drains pipes sewers culverts ponds wells springs streams and watercourses and to prevent streams from overflowing or being diverted so as to cause injury or inconvenience to other tenants.

"To farm cultivate manure and manage the farm in a good and husbandlike manner according to the most approved methods of husbandry in the district so as to keep the whole at all times in good heart and condition and not to allow any part to become impoverished by exhausting crops or otherwise.

"Not to commit or permit spoil or waste on any part of the premises.

"To yield up at the expiration of the tenancy all the demised premises in such a state of repair cultivation or management as shall be in compliance with the tenant's covenants hereinbefore contained."

There are generally many other covenants in the lease of a farm, with a view to prevent deterioration of the land, varying according to the county in which the farm is situated.

An example of a covenant dealing with cropping, etc., will be found in Chapter XV.

It will be noticed that the covenants given fix the period for external painting as once in every *three* years. This is very necessary in towns, but in the country it is not uncommon to specify that the external painting shall be once in every four years.

When the covenant is to paint once in every third or fourth year the tenant is not liable to paint until such third or fourth year arrives, and should his lease terminate before the end of a third or fourth year (*e.g.*, at the end of 14 years) he would not be liable to paint, provided of course he had done so during the preceding third or fourth year of his term. To guard against this it is usual to provide that "the last painting both outside and inside, to be in the year immediately preceding the determination of this

lease, whether by effluxion of time or otherwise," or similar words which will ensure the painting being done at the expiration of the lease.

It will also be noticed that there is no "fair wear and tear" clause in the above long leases, although this can be added if the parties so agree. It is, however, of little use when the lease contains strict covenants like the above, in which all the requisite repairs and painting are specifically set out.

Interpretation of Covenants.—There are numerous legal decisions as to the extent of the tenant's liability under the various repairing covenants. In these the tenant usually undertakes to keep the premises in "good," "habitable," "necessary," "needful," "substantial" or "sufficient" repair; but none of these expressions has any particular or technical value, and in law they all have much the same meaning, viz., that some repair is or will be necessary, and that the state of repair shall be such that the premises may be used or dwelt in not only with safety but with reasonable comfort by the class of persons likely to occupy them. In fact, it seems that the word "repair" by itself will include a certain amount of painting, if wood or other work will decay or perish for lack of paint, and provided there is no "fair wear and tear" clause in the covenant.

In a recent case [1] Lord Justice Fletcher Moulton stated "It is plain that the word "repair" refers to an operation to which the defendants (the tenants) bind themselves to have recourse. For my own part, when the word "repair" is applied to a complex matter like

[1] *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K.B., at p. 918.

a house, I have no doubt that the repair includes the replacement of parts. Of course, if a house had tumbled down, or was down, the word "repair" could not be used to cover rebuilding." In the same case[1] Lord Justice Buckley expressed his opinion that "'Repair' and 'renew' are not words expressive of clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part . . . Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety, not necessarily the whole, but substantially the whole subject-matter under discussion."

A tenant is not liable, in an action for breach of a repairing covenant, for acts done before the landlord has signed the lease, although subsequent to the day fixed in the lease for the commencement of the term.[2] A repairing covenant may be dependent on the fulfilment of a condition precedent. Thus a covenant by the tenant to keep premises in repair, after the landlord shall have put them in repair, is conditional. The landlord must repair before it can be alleged against the tenant that he has allowed the premises to fall into a state of decay owing to non-repair.[3]

In all the examples given of repairing contracts suitable for short tenancies it will be noticed that "reasonable wear and tear" is allowed, and when this is so and there is no express contract to paint or repair, etc., the tenant is not liable for dilapidations caused by

[1] *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K.B., p. 923.

[2] *Shaw* v. *Kay*, (1847) 1 Ex. 412.

[3] *Slater* v. *Stone*, (1623) Cro. Jac. 645; *Cannock* v. *Jones*, (1849) 3 Ex. 233; *Neale* v. *Ratcliffe*, (1850) 15 Q.B. 916.

the friction of air, dilapidations caused by exposure, or dilapidations caused by ordinary use. It has been held that a tenant holding under a lease in which he covenanted "**to deliver up at the expiration or sooner determination of the said term the messuage with all fixtures attached thereto in as good repair and condition as it now is in reasonable wear and tear and damage by fire excepted**" was not liable for external painting, repointing brickwork, nor for repairing parts of a kitchen floor which had become defective owing to dry rot.[1] With such a covenant the tenant's liability is very slight, and practically he is only liable for accidental or other damage which does not result from fair wear and tear.

Under a covenant "**to substantially repair, uphold and maintain the premises**" a tenant has been held liable to keep up the internal painting.[2]

In an action brought on a covenant to "**well and sufficiently repair uphold support amend pave,**" etc., etc., and to yield up the premises at the end of the term "**in good and substantial repair and condition,**"[3] the Judge (Chief Justice Tindal) told the jury the question for them was whether the covenants had been really and substantially complied with, for that, in cases of this nature, it was hardly expected that a strict and literal performance of so general a covenant (unless where the language pointed to any particular matter) could be proved. The words at the end of the covenant (as to yielding up in "good and substantial

[1] *Terrell* v. *Murray*, (1901) 17 T.L.R. 570.

[2] *Monk* v. *Noyes*, (1824) 1 C. & P. 265.

[3] *Harris* v. *Jones*, (1832) 1 M. & Rob. 173.

repair and condition") were to be taken as a clue to the meaning of the general words. The tenant was only bound to keep up the house as an old house (the house in question being old).

Where there is a general covenant to repair, it refers both to buildings erected at the date of and subsequent to the lease; but where the repairing covenant is in its terms limited to certain specified buildings it must not be extended beyond those buildings. For instance, a tenant of three houses and a field had covenanted to repair, sustain, etc. "the said tenements or dwelling houses field or plot of ground and premises and every part thereof." He subsequently sub-let the field, on which a number of houses were built. It was held that the repairing covenant did not extend to the additional houses, being separate and distinct. But Baron Bramwell stated, "It would be difficult to say that the covenant would not extend to *any* new building. . . . . I think that if an addition had been made to an old house by putting a lean-to or a stable it would have been part of the house within the meaning of the covenant. . . . But I think it does not extend to a new building, as for instance a barn, erected at a distance from the house." [1] In such cases the liability depends on the exact wording of the covenant. In most repairing covenants the tenant is usually bound to repair "all additions or erections which may at any time during the said term be erected on the land hereby demised."

A condition in a Will that the devisee shall keep "the mansion house . . . parks grounds . . . and

[1] *Cornish* v. *Cleife*, (1864) 3 H. & C. 446; *Smith* v. *Mills*, (1899) 16 T.L.R. 59.

appurtenances thereto belonging in good and substantial repair order and condition" during a certain term, does not impose any obligation on the tenant for life to clean out and scour an ornamental lake which has become in a foul condition.[1]

A covenant "forthwith" to put premises into complete repair must receive a reasonable construction and is not to be limited to any specific time, and therefore it will be for the jury to say, upon the evidence, whether the tenant had done what he reasonably ought in the performance of it.[2] "There is no doubt that the word 'forthwith' means with all reasonable celerity; it does not mean immediately."[3]

If a tenant covenants to "well and sufficiently repair and keep in proper repair," he is bound to *keep* the premises in repair, and in order to keep them in repair he must have them in repair *at all times during the term*, and if they are at any time out of repair he is liable for breach of covenant,[4] and a tenant will not, by reason of his having employed persons to repair, be relieved from liability, if in fact such persons have not repaired.[5]

"A general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate,"[6] thus, although the wording may be identical, a repairing covenant contained in an under-lease may have a

[1] *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

[2] *Doe* d. *Pittman* v. *Sutton*, (1841) 9 C. & P. 706.

[3] *Burgess* v. *Boetefeur*, (1844) 7 M. & G. 494.

[4] *Luxmore* v. *Robson*, (1818) 1 B. & A. 584.

[5] *Nokes* v. *Gibbon*, (1857) 26 L.J. Ch. 433.

[6] Per Parke, B., in *Walker* v. *Hatton*, (1842) 10 M. & W. 249.

different legal meaning and effect from the repairing covenant contained in the original lease, if the underlease is made a long time after the original lease, because during that period the condition and age of the building will have altered considerably.

Where an old building is leased, it is not intended that the tenant shall restore to the landlord a house of greater value at the end of the term than it was at the commencement. The tenant who has covenanted to repair is bound to keep the house, as nearly as possible, in the same condition as it was in at the date of the lease, allowance being made, however, for the effect of time and the elements.

A general covenant to keep in repair is broken by cutting a doorway through the party wall into the adjoining house,[1] or by pulling down any part of the premises,[2] and the lessor may sue and recover substantial damages during the term for such a breach of covenant.

Under a covenant to "**well and sufficiently maintain uphold support and keep in good substantial and tenantable repair**" all the demised premises including the walls, piers, pillars, supports and roof forming part of same; the premises were portions of the sub-structure and supports of Smithfield Meat Market, being let on lease and used by the tenants as a railway station. The substructure had been excavated, and the supports for the roof constructed upon a standard of efficiency to the satisfaction of referees appointed by agreement on behalf of the landlords and tenants. The iron girders supporting the roof and substructure had become

[1] *Doe* d. *Vickery* v. *Jackson*, (1817) 2 Stark. 293.

[2] *Gange* v. *Lockwood*, (1860) 2 F. & F. 115.

corroded and weakened, and notice to repair according to the covenant was given to the tenants. The Court held that, upon the true construction of the lease, the landlords were entitled to require the tenants to maintain the demised premises at a standard of strength and stability corresponding with that originally fixed by the referees, and not merely in such a condition as would secure the absolute safety of the superstructure.[1]

This case is, however, rather out of the ordinary, seeing that a standard of strength for the girders had been previously agreed upon on behalf of the landlords and the tenants, and would hardly be applicable in the case of an ordinary building above ground.

Where a tenant takes premises which are old and out of repair, and agrees "to *put* the premises into habitable repair," this implies that he is to put them into a better state than that in which he found them[2]; regard must, however, be had to the age of the premises. It does not mean that the tenant should give the landlord new buildings at the end of his tenancy, but that he should take the premises out of their former dilapidated condition, and deliver them up fit to be occupied for the purposes for which they were intended to be used.

Where a tenant of a farm and outbuildings, etc., agreed that he would "keep the same and at the expiration of the said tenancy would deliver up the same in good repair order and condition," it was held that if, at the time of the lease, the premises were old and in bad repair, the tenant was bound to put them in good repair *as old premises*; for he cannot "keep" them in

[1] *London Corporation* v. *Great Western and Metropolitan Railways*, [1910] 2 Ch. 314.

[2] *Belcher* v. *McIntosh*, (1839) 8 C. & P. 720; 2 M. & Rob. 186.

good repair without putting them into it, and he must so keep them during the whole lease. The tenant is not justified in keeping the premises in bad repair because they happened to be in that state when he took them; at the same time a contract to "put" premises into good repair does not mean to provide new buildings where those demised were old, but to put and keep them in "good repair," having regard to their age. The term "good repair" is to be construed with reference to the subject-matter, and must vary in its meaning according to the class of property. For instance, what might be considered "good repair" in a workman's cottage would not be so considered in a palace.[1]

In another case[2] the tenant covenanted that he would "**keep the inside of the premises in tenantable repair and so deliver up the same at the end of the term.**" The lease was for five years, but the tenancy was continued for seventeen years. There was no provision for periodical painting, as this was never contemplated as likely to be necessary in a five years' lease. The landlord, however, claimed to have the house papered and painted so that it should be left in the same condition as when it was let, and that the damages should be assessed on that footing. Mr. Justice Cave in his judgment stated "the tenant is to keep the inside in tenantable repair. It so happened that the occupation lasted longer than five years, but the covenant as to repairing cannot be extended. It must mean the same as it meant before. It does not mean anything in the way of decorative repair at all." Where, however, "waste" had occurred the

[1] *Payne* v. *Haine*, (1847) 16 M. & W. 541.

[2] *Crawford* v. *Newton*, (1886) 36 W.R. 54.

landlord was entitled to compensation for that. He found that some paint would be necessary to prevent the house from going to decay, and he held that the tenant was bound to paint to that extent. The tenant was not bound to do any decorative painting or papering, as these were not necessary to preserve the woodwork or walls. This decision was upheld by the Court of Appeal.

It will be noticed that this case does not define the meaning of the words "tenantable repair," as the Judge held that the covenant to keep the premises in this state only applied to the five years contemplated in the original lease and could not be extended. The tenant at the end of the lease became a yearly tenant, but was liable on the terms of the old lease so far as they were applicable to a yearly tenancy, hence that liability, although very slight, continued, but all that the tenant could be required to do was to paint when necessary to prevent actual decay, as in this case there was no agreement to paint at stated intervals.

One of the most important decisions dealing with the interpretation of an express covenant to repair was that given in *Proudfoot* v. *Hart*,[1] in which the Court of Appeal gave a definite construction of a tenant's contract, contained in a three years' agreement, "to keep the said premises **in good tenantable repair** and so leave the same at the expiration thereof."

It will be noticed that in this contract there was *no* allowance for "fair wear and tear." The house in question was situated in Kentish Town, London,

[1] (1890) L.R. 25 Q.B. D. 42.

and the landlord claimed, and the Official Referee awarded, the cost incurred by the landlord after the termination of the tenancy, in repapering walls, where the paper which was upon them when the tenancy commenced had become worn out; in repainting the internal woodwork where the paint which was on such woodwork when the tenancy commenced had worn off; in whitewashing and cleaning the staircase and ceilings; and in replacing with a new floor a kitchen floor which was in existence when the tenancy commenced.

This award was appealed against, and the case subsequently came before the Court of Appeal to define the exact meaning of the tenant's contract as given above. Shortly, the Court held that the tenant's obligation under such a contract is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it. The case was remitted to the Official Referee for him to reconsider his decision.

The tenant's liability under the above contract is, therefore, as follows:—If the house is out of repair when he takes it, he must put it into tenantable repair, but regard must be had to its age. If the house is a good one in a good class neighbourhood the tenant must paint, repaper, whitewash, and repair, if such painting, repapering and whitewashing and repairs would be necessary to satisfy the requirements of a reasonably-minded incoming tenant before he would occupy the house: the new paper need not be of as good a quality as the old, provided it is suitable to the

class of property. The state of repair need not be perfect, so long as it renders the house reasonably fit for occupation. Since these requirements would depend on the class of tenant, it is apparent that in a lower class neighbourhood the liability of the tenant under the covenant would be considerably less. "As to a defective and rotten floor it is the duty of the tenant, if he cannot patch it up so as to make it a floor, to replace that which is no longer a floor by something which is a floor."[1]

Owing to the importance of the case it is considered advisable to give extracts from the judgment of Lord Esher, M.R., at some length. He stated:—

"Where the premises are not in repair when the tenant takes them, he must put them into repair in order to discharge his obligation under a contract to keep and deliver them up in repair. . . . The question whether the house was or was not in tenantable repair when the tenancy began is immaterial, but the age of the house is very material with respect to the obligation both to keep and to leave it in tenantable repair. The age of the house must be taken into account, because nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it

[1] Per Cozens-Hardy, M.R. (commenting on *Proudfoot* v. *Hart*), *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K.B., at p. 914.

reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it. . . . I agree that a tenant is not bound to re-paper simply because the old paper has become worn out, but I do not agree with the view that under a covenant to keep a house in tenantable repair the tenant can never be required to put up a new paper. Take a house in Grosvenor Square: if when the tenancy ends the paper on the walls is merely in a worse condition than when the tenant went in, I think the mere fact of its being in a worse condition does not impose upon the tenant any obligation to re-paper under the covenant, if it is in such a condition that a reasonably-minded tenant of the class who take houses in Grosvenor Square would not think the house unfit for his occupation. But suppose the damp has caused the paper to peel off the walls and it is lying upon the floor, so that such a tenant would think it a disgrace, I should say, then, that the tenant was bound, under his covenant to leave the premises in tenantable repair, to put up a new paper. He need not put up a paper of a similar kind—which I take to mean equal value—to the paper which was on the walls when the tenancy began. He need not put up a paper of a richer character than would satisfy a reasonable man within the definition."

With regard to the tenant's obligation to paint, Lord Esher held that—

"If the paint is in such a state that the woodwork will decay unless it is repainted, it is obvious that the tenant must repaint. But I think that his obligation goes further than that. A house in Spitalfields is never painted in the same way as one in Grosvenor Square. If a tenant leaves a house in Grosvenor Square with painting only good enough for a house in Spitalfields, he has not discharged his obligation. He must paint it in such a way as would satisfy a reasonable tenant taking a house in Grosvenor Square."

On the same principle Lord Esher held that the tenant was not bound to whitewash the ceilings if they were sufficiently clean to satisfy a reasonable tenant,

and in no case would this covenant extend to re-gilding an ornamental ceiling.

Dealing with the question of a new floor which the landlord claimed, Lord Esher stated—

"The question is, what is the state of the floor when the tenant is called upon to fulfil his covenant? If it has become perfectly rotten he must put down a new floor, but if he can make it good . . . he is not bound to put down a new floor. If he leaves the floor out of repair when the tenancy ends, and the landlord comes in, the landlord may do the repair himself and charge . . . the tenant with the necessary cost of a floor which would satisfy a reasonable man taking the premises. If the landlord puts down a new floor of a different kind he cannot charge the tenant with the cost of it."

An important case dealing with a tenant's liability for structural repairs was *Lister* v. *Lane and Nesham*.[1] The tenants in a seven years' lease covenanted that they would "when and where and as often as occasion shall require **well sufficiently and substantially repair uphold sustain maintain . . . amend and keep**" the demised premises, and the same "so well and substantially repaired upheld supported sustained maintained . . . amended and kept" at the end of the term, yield up to the lessors.

The house was at least 100 years old, and possibly much older. Before the end of the lease one of the walls of the house was bulging outwards, and after the end of the lease the house was condemned by the district surveyor as a dangerous structure and was pulled down. The landlord claimed from the tenants the cost of rebuilding the house, which he alleged was necessary, owing to the tenants' neglect

[1] [1893] 2 Q.B. 12.

to repair in accordance with a notice to repair which had been served on them under the above covenant. The tenants had executed the repairs included in the notice, except to the bulged wall, the repair of which would have been impossible without pulling down and rebuilding the whole house, since the whole house had been built on a timber sill or platform resting on a muddy soil, and this platform had decayed and caused the house to sink. The house could not have been repaired by putting a new timber foundation, but it would have been necessary to "underpin" with concrete or brickwork through 17 feet of mud in order to reach the solid gravel beneath. The tenants in their defence stated that the notice to repair required work to be done which they were not bound to do by the terms of the repairing covenant, and that the premises had been repaired and delivered up in repair in accordance with that covenant. The evidence given by the tenants at the trial was directed to show that the house as repaired was a house in poor condition, because it was a house with very poor foundations, and that the notice had called upon them to support the house on foundations of a totally different type from those which it had at the time when the lease began. Judgment was given in favour of the tenants, and this was appealed against.

The Court of Appeal upheld the decision of the Court below. Lord Esher stated:—

"If a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of a covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the

tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and moreover, the result of the nature and condition of the house itself, the result of time upon that condition, is not a breach of the covenant to repair."

Lord Justice Kay agreed that in this case the underpinning would involve making an entirely new and different house. He added:—

"The only way to repair it (the house) is by this underpinning. That would not be either repairing, or upholding, or maintaining such a house as this was when the lessee took it, and he is not liable under his covenant for damage which accrued from such a radical defect in the original structure."

This case must not be understood to decide that a tenant will never be liable to rebuild or renew portions of a house which have become decayed from age, faulty construction, or whatever may be the cause. What it decides is, that a tenant is not required to give up totally different premises from those that were let to him, or to pay the cost of foundations which did not exist in the premises that he gave up.

Referring to the case of *Lister* v. *Lane and Nesham*, in a recent judgment[1] of the Court of Appeal the Master of the Rolls stated:—

"Nothing could be done but to remove the house, to pull it down, or to underpin it to a depth of 17 feet, and to build up some brick or other structure from the gravel or chalk up to the house. It was held there, and I see no reason to quarrel with it, by the Court of Appeal that the circumstances had so changed, and that such a state of

[1] *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K.B., at p. 913.

circumstances had arisen that it could not have been within the contemplation of the parties, and that it could not be reasonable to construe the covenant to that effect."

In the same judgment[1] Lord Justice Fletcher Moulton said:—

"It (*Lister* v. *Lane*) certainly contains nothing which says that a covenantor is in any way relieved from the burden of his covenant, because it may be that in order to fulfil it he will have, to a certain extent, to rebuild the premises."

In the case of *Wright* v. *Lawson*[2] the tenant covenanted to "**substantially and effectually repair uphold and maintain** . . . the premises" and also at the end of the term to deliver up the premises in a condition in accordance with the covenant. On the first floor there was a bay window which developed cracks, and subsequently the tenant was served with a "dangerous structure notice" by the district surveyor under the London Building Acts, 1894 and 1898, with reference to the external walls and the bay window. The tenant instructed his builder to comply with the notice, and the window was taken down. As it was impossible, owing to the house being old and badly built, to re-erect the window in the same way in which it was before, without its being condemned as dangerous by the County Council, the tenant built a new window set back in the main wall of the house. The landlord brought an action to compel the tenant to restore the premises to the condition in which they were when the lease was granted, by replacing the bay window. The evidence showed that practically a new bay window, such as would satisfy the requirements of the

[1] *Lurcott* v. *Wakely and Wheeler*, 1 K.B., at p. 922.

[2] [1903] W.N. 108; 19 T.L.R. 510.

County Council, could only be erected by supporting it by two columns from the ground to the window; or at any rate, that supports of a substantial character would be required.

Mr. Justice Kekewich gave judgment for the tenant. He held that the tenant was not liable to replace the bay window, since it was impossible to do so consistently with the requirements of the London County Council. He did not think that erecting a new bay window supported by columns could be regarded as the repair of the old bay window. It would be erecting a new bay window of a totally different character. The tenant had really been prevented from performing his covenant by *vis major* in the shape of the London County Council. This decision was upheld by the Court of Appeal.

It will be noticed that in both the preceding cases the repairs would have necessitated the tenant giving to his landlord something of an entirely different character from that which he took at the date of the lease, and consequently the tenant was not liable. Where, however, a tenant has undertaken to repair, and, owing to age and the effect of the elements, to do so will involve renewal of or rebuilding a part of the premises, then the tenant will be bound by his covenant.

Thus, in the recent case of *Lurcott* v. *Wakely and Wheeler*,[1] the tenant had covenanted to "**well and substantially repair and keep in thorough repair and good condition**" the demised premises, and at the end or sooner determination of the term to yield up the same to the lessors, their heirs and assigns.

[1] [1911] 1 K.B. 905.

Shortly before the expiration of the lease the London County Council served a "dangerous structure notice" on the owners and occupiers requiring the front external wall of the house to be pulled down, it being in such a condition, owing to the effect of time and the elements (the house being over 200 years old), that it could not be patched up so as to be really available as a wall and to answer the purposes of a wall.

The landlord complied with the notice, and rebuilt the wall. He then brought an action against the tenants for the cost, and was successful. The tenants appealed.

In the Court of Appeal judgment was also given in the landlord's favour, it being held that the tenant was liable to rebuild the wall in question under his repairing covenant. In the opinion of the Master of the Rolls this portion of the wall in front was plainly merely a subsidiary portion of the demised premises, the rebuilding of this part leaving the rest of the building, going back 140 feet, untouched. The rebuilding of this wall did not change the character or nature of the building, and he was unable to see that the case was any different from one in which say, by reason of the elements and lapse of time, some rafters in a roof had become rotten and a corner of the roof gave way, so that the water came in, in which case the tenant would obviously be liable to repair under his covenant.

Lord Justice Fletcher Moulton stated[1]: —

"But we must bear in mind that while the age and the nature of the building can qualify the meaning of the covenant, they can never relieve the lessee from his

[1] *Lurcott* v. *Wakely and Wheeler*, 1 K.B., at p. 916.

obligation. If he chooses to undertake to keep in good condition an old house, he is bound to do it whatever be the means necessary for him to employ in so doing. He can never say: 'The house was old, so old that it relieved me from my covenant to keep it in good condition.'

"If it is so old that to keep it in good condition would require replacement of part after part until the whole is replaced—if that was necessary—then, by entering into a covenant that he would do it, he took on his own back the burden of doing it with all that this duty might entail."

The distinction between the above case and that of *Lister* v. *Lane* or *Wright* v. *Lawson* will be apparent. In *Lister* v. *Lane*, to repair the house involved rebuilding the whole, and giving back to the landlord something quite different to that which he had leased, and this was consequently held to be beyond the tenant's covenant to *repair*.

In *Wright* v. *Lawson* the bay window could not be replaced, supported as it must have been before by cantilevers, but could be reinstated only by something which would be a new structure, namely a bay window supported by vertical supports from the ground.

In *Lurcott* v. *Wakely* the front wall, although as in both these cases it had become defective owing to similar causes (viz., natural decay and lapse of time), was only a subsidiary part of the demised premises, to rebuild which did not alter the character of the building, or involve giving back to the landlord a new and entirely different building; consequently the tenant was liable under his repairing covenant.

The result of the various decisions appears to be this:—

Where a tenant has expressly covenanted to repair and there is no proviso allowing him "fair wear and tear," he is liable to repair, and if necessary renew,

any *part* of the premises damaged by the effect of time, weather, or other causes. The state of repair must be such as would satisfy a reasonably-minded tenant of the class likely to take the property.

But when the damage is of such a nature that to remedy it would result in the landlord receiving at the end of the lease a new building or one of an entirely different character from that which was the subject of the lease, then the tenant is not liable, under his repairing covenant, to renew or rebuild.

It seems that in most cases a covenant to keep and to deliver up premises in "good" or "tenantable" repair is really all that is necessary to safeguard the interests of the landlord. The use of such expressions as "uphold," "maintain," "sustain," "support" "thorough repair," "substantial repair," etc., carry little or no more weight in defining the extent of the tenant's obligation to repair.

The Liability of Tenants and their Assignees on Express Covenants after Assignment.

The liability of assignees on implied covenants has been considered in Chapter IV.

The tenant, after assignment, remains liable on all *express* covenants contained in the original lease, and he may be sued by the landlord on them; or if the latter has assigned his reversion, by the latter's assignee on covenants which "run with the land."

The assignee of a tenant is liable to the landlord, or to the latter's assignee, on certain *express* covenants if such covenants "run with the land." In order that an express covenant shall run with the land, the lease must be under seal, and the express covenant must *touch and concern the thing demised*, and it is sometimes

a question of difficulty to decide whether or not a particular covenant does so. It has, however, been held that an express covenant to repair, to put in repair, to leave in good repair, to paint, to insure buildings against fire, and many other covenants which are beyond the scope of the subject of Dilapidations, but which touch and concern the thing demised, run with the land, and the assignee will be bound by them, even though the tenant has only covenanted for himself and did not in the lease specifically bind "his assigns."

This, however, does not apply to things not in existence at the time when the lease was made: *e.g.*, a covenant to erect or to repair a building which is to be subsequently built will not bind an assignee unless "assigns" are specially included in and bound by the covenant.[1] But a covenant to repair the messuage *and all other erections and buildings which should or might be erected during the term*, was held to run with the land, and the assignee was bound by it, although "assigns" were not mentioned in the covenant,[2] the Court holding that this was not a covenant absolutely to do a new thing, but to do something conditionally, viz., if there are new buildings, to repair them; as when built they will be part of the thing demised, and consequently the covenant extends to its repair. The point, however, is not of very much practical importance, as "assigns" are almost invariably included in such covenants.

An express covenant which is merely a personal one between the original landlord and tenant, or if the

[1] *Spencer's Case*, (1583) 1 Smith, L.C.

[2] *Minshull* v. *Oakes*, (1858) 27 L.J. Ex. 194.

thing agreed to be done is merely collateral to the land and does not concern the thing demised, will not bind the assignee, even if "assigns" are expressly mentioned in the covenant. For instance, if a tenant covenants for himself or his assigns to build a house upon land belonging to the landlord but which is no part of the land which is let, or to pay any collateral sum to the landlord or to a stranger, it will not bind the assignee, because it is merely collateral, and in no way touches or concerns the thing that was demised or that is assigned over.

In a recent case[1] a tenant covenanted to keep in repair all buildings erected on the land, there being a right of re-entry by the landlord for breach of covenant. The tenant sub-let part of the land, the under-lease containing a covenant by himself as under-lessor, his executors, administrators and *assigns*, to perform those covenants of the head-lease which related to that part of the land which he had not sub-let. He subsequently assigned, but his assignee failed to repair the houses erected on that part of the land, and the assignee of the reversion recovered possession of the whole of the property comprised in the original lease, under the proviso for re-entry for breach of covenant. The under-tenant had also assigned, and the action was brought by his assignee against the assignee of the original tenant to recover damages for breach of the covenant in the under-lease. The Court, however, held that the covenant relating to the buildings which were not the subject of the under-lease was merely collateral, and did not run with the land, and therefore did not bind the assigns of the tenant, although "assigns" were

[1] *Dewar* v. *Goodman*, [1909] A.C. 72.

expressly mentioned, and that therefore the plaintiff could not recover.

No action for breach of covenant can be brought against the assignee of the tenant, except for breaches happening while he is assignee; and, therefore, as explained in Chapter IV., by assigning even to a pauper, an assignee may get rid of his future liability, but the assignee will remain liable to his immediate assignor on all express covenants contained in the deed of assignment.

Where a tenant has assigned his lease, and the deed of assignment contains a covenant by the assignee to fulfil the covenants of the lease from the date of such assignment, although the landlord may recover damages from the tenant for breach of the latter's express covenant to repair, the tenant can only recover from his assignee the cost of such dilapidations as have accrued since the date of assignment.[1]

Liability of Tenant's Executor or Administrator.

On the death of a tenant, his executor or administrator, having entered and taken possession of the demised premises, becomes liable under covenants contained in the lease, and also for rent, to the extent of the assets which come into his hands, but he is not liable as an assignee personally to the landlord. With regard, however, to the covenant to repair, it has been held that an executor is, like any other assignee, personally liable in respect thereof to the landlord, but he may recoup himself out of the assets (if any) for what he has been obliged to spend on repairs.[2] It seems

[1] *Hawkins* v. *Sherman*, (1828) 3 C. & P. 459.

[2] *Tremeere* v. *Morrison*, (1834) 4 M. & Sc. 603; *Rendall* v. *Andreæ*, (1892) 61 L.J. Q.B. 630.

that an executor who has made an offer to surrender a lease under which his testator held, is not liable as an assignee for breaches of a covenant to repair occurring after the date of such offer.[1]

When a lease is specifically bequeathed by Will, directly an executor assents to the bequest, the legatee of the lease is regarded as assignee thereof and is liable on the covenants contained therein.[2]

Where a tenant had covenanted to insure against fire, and, two days after the policy expired, he died without having paid the premium, and two months later the house was burnt down, it was held that the executors of the tenant were not personally liable for not having kept up the insurance.[3]

Liability of Tenant on Holding Over.

When a lease expires and the tenant still remains in possession, he becomes a tenant on sufferance. But when the tenant pays or agrees to pay either the same or an increased rent, nothing more being expressed between the parties as to the terms of the new tenancy, a tenancy from year to year is created on the covenants contained in the former lease, so far as they are applicable to, and not inconsistent with, a yearly tenancy.[4] Such yearly tenancy will be terminable at the end of the first year by a six months' notice to quit, expiring at the end of the first year.[5] If the lease contained an unconditional covenant to keep the premises in repair

[1] *Reid* v. *Tenterden* (*Lord*), (1833) 4 Tyr. 111.

[2] *Austin* v. *Beddoe*, [1893] W.N. 78.

[3] *Fry* v. *Fry*, (1859) 28 L.J. Ch. 593.

[4] *Dougal* v. *McCarthy*, [1893] 1 Q.B. 736.

[5] *Doe* d. *Clarke* v. *Smaridge*, (1845) 7 Q.B. 957.

and the premises are burnt down by accidental fire during the new tenancy, the tenant will be bound to rebuild.[1]

The law does not appear to be very definite as to what covenants of the former lease would be consistent with a yearly tenancy. For instance, where in a lease a tenant had agreed to pay all "outgoings," and remained in possession on a yearly tenancy, it was held that he was not liable for the cost of remedying a defective drain in accordance with the requirements of the sanitary authority, the cost of which exceeded the yearly rent, as the tenant could not be presumed to have intended to become a yearly tenant on the terms of such an obligation.[2]

But in a case where a seven years' lease contained a proviso that, unless notice was given to determine the tenancy at the end of the seven years, it should continue as a lease from year to year upon the same covenants, it was held that the lease continued after the seven years until put an end to by notice, and that the tenant was liable under his covenants to "well and substantially repair," and "so well and substantially repaired to yield up at the end of the term."[3] Presumably, a tenant who holds over would be liable for periodical painting, etc., if specified in the former lease. It is, therefore, always advisable that some clear understanding as to the terms of the new yearly tenancy should be arrived at between the parties.

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[1] *Digby* v. *Atkinson*, (1815) 4 Camp. 275.

[2] *Harris* v. *Hickman*, [1904] 1 K.B. 13.

[3] *Brown* v. *Trumper*, (1858) 26 Beav. 11.

CHAPTER VII.

DAMAGE CAUSED BY FIRE.

UNLESS there is an express covenant to repair, a landlord cannot sue his tenant for damages arising from accidental fire; but if there is a general covenant by the tenant to repair the premises, and no exception is made for damage by fire, the tenant must rebuild them if burnt down by accident, negligence, or otherwise.[1] Further, unless the lease provides to the contrary, the tenant will continue liable to pay rent until the end of his lease, even though the premises are uninhabitable.[2]

The tenant who has agreed to repair, in a lease containing no proviso that damage by fire is excepted, should therefore himself insure the premises against damage by fire, and by paying an increased premium he can also insure against payment of rent during the reinstatement of the building, or while it is untenantable in consequence of fire, including architects' or surveyors' fees necessarily incurred in the restoration of the building.

The freedom of the tenant from liability for accidental fire when there is no express covenant to repair, arises by Statute. Section 86 of the old

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[1] *Bullock* v. *Dommitt*, (1796) 6 T.R. 650.

[2] *Baker* v. *Holtpzaffell*, (1811) 4 Taunt. 45.

Metropolitan Building Act, 1774,[1] (this section together with Section 83, being the only ones now in force, the remainder of the Act having been repealed) provides that "no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall *accidentally begin*, nor shall any recompense be made by such person for any damage suffered thereby . . . provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void." In other words, the Act does not affect an express covenant to repair.[2]

The Statute, which is not limited to the Metropolis but has been held to apply to the whole kingdom, must be taken only to refer to fires which are the result of chance, or which are incapable of being traced to any cause, and not to fires which, although they may be accidental as opposed to wilful, are occasioned by negligence or want of reasonable care.

Usually in three years' agreements and in shorter tenancies there is a proviso inserted in the repairing contract, "Damage by fire excepted," and when this is so, the tenant will not be liable to rebuild in case of fire, but it should be remembered that the release of the tenant from liability does not impose on the landlord any obligation to rebuild after fire, neither does it relieve the tenant from his liability to pay rent. In some leases the landlord undertakes to insure the premises and to expend the insurance money in

[1] 14 Geo. III., c. 78.

[2] *See* Note on this Statute in Appendix.

rebuilding, and also relinquishes his right to rent while the premises are uninhabitable. When this is so, the covenants are generally something to the following effect. The landlord covenants :—

"To keep the demised premises insured against loss or damage by fire and in case of damage or destruction by fire (unless the insurance moneys become irrecoverable through any act or default of the tenant) to rebuild and reinstate the same as speedily as possible.

"In case the demised premises or any part thereof shall at any time during the said term be destroyed or damaged by fire so as to be unfit for occupation and use, and the policy or policies effected by the landlord shall not have been vitiated or payment of the policy moneys refused in consequence of some act or default of the tenant the rent hereby reserved or a fair proportion thereof according to the nature and extent of the damage sustained shall cease and be suspended until the said premises shall be again rendered fit for occupation and use and in the case of difference touching this proviso the same shall be referred to arbitration."

In longer leases the tenant generally covenants to insure the premises for a specified sum against fire ; and if he also covenants to repair, his liability will not be limited to the amount received from the Insurance Company, but he will have to pay, out of his own pocket, whatever balance is necessary to reinstate the premises in their former condition,[1] and, as already stated, he will have to continue paying rent until the end of the term.

In order to protect the tenant from the latter liability a clause abating the rent, similar to the above, with the necessary alterations in detail, is often inserted.

[1] *Digby* v. *Atkinson*, (1815) 4 Camp. 275.

If a tenant has unconditionally agreed to repair, he will have to rebuild after fire, even if the landlord has insured and has received the insurance money,[1] as the latter is only bound to rebuild when he has expressly covenanted to do so.

A policy of fire insurance is, however, a contract of indemnity (*i.e.*, one to make good another's loss caused by some specified act); and if the landlord has insured a house and received the insurance money, but the tenant has, under his repairing covenant, rebuilt the premises, the Insurance Company can recover from the landlord the money which they have paid him on his policy.

Provision has also been made by Section 83 of the old Metropolitan Building Act, 1774,[2] for ensuring that money due under a fire policy is expended in rebuilding.

The effect of the section is as follows:—When a house or building which is insured has been damaged by fire, the directors of the Insurance Company shall, *if requested* by *any person or persons interested in or entitled unto* such houses or other buildings (the expression "person interested" seems to include the tenant as well as the landlord) cause the insurance money to be expended, in so far as it will go, in rebuilding the premises, unless the person claiming the insurance money shall within sixty days after his claim is adjusted, give a sufficient security to the directors that the money will be laid out in rebuilding. The directors have similar power, without any request being made to them, if they have any grounds of suspicion that the person who has insured has been guilty of fraud or has wilfully set the building on fire.

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[1] *Leeds* v. *Cheetham*, (1827) 1 Sim. 146.

[2] See whole section in Appendix.

In order to entitle the landlord to the benefit of this section he must make a distinct request to the Insurance Company to lay out the insurance money in rebuilding before they have settled with the tenant insuring; and in no case is the owner entitled to rebuild the premises himself, and then claim the insurance money.[1]

Trade fixtures put up by a tenant and removable by him do not come within the words "houses or other buildings."[2]

This section is still in force, and has been held to apply not only to London but to the whole kingdom,[3] although in a later case it seems that in the opinion of the House of Lords it does not apply to Scotland.[4]

If the landlord has insured and the tenant has not, and the demised premises are burnt down, the tenant should at once request the Insurance Company to lay out the policy money in rebuilding. If, however, the landlord is under covenant to rebuild in case of fire, this will not be necessary, as the landlord will be bound by his covenant.

If the tenant has insured the building, it is seldom that any question arises, as if the lease expressly provides for insuring it invariably provides for rebuilding, and of course in most cases it is to the tenant's interest to do so as soon as possible.

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[1] *Simpson* v. *Scottish Union Insurance Co.*, (1863) 1 H. & M. 618.

[2] *Goreley, Ex parte; In re Barker*, (1864) 34 L.J. Bk. 1.

[3] *Ibid.*

[4] *Westminster Fire Office* v. *Glasgow Provident Investment Society*, (1888) 13 App. Cas. 699; per Earl of Selborne and Lord Watson, at p. 716.

A tenant who, after the expiration of a lease, "holds over" and pays rent, will be liable to rebuild the premises if they are burnt down, if the former lease contained a covenant to keep the premises in repair, with no exception for damage by fire.[1]

[1] *Digby* v. *Atkinson*, (1815) 4 Camp. 275.

CHAPTER VIII.

LIABILITY TO THIRD PERSONS FOR DILAPIDATIONS.

THE LANDLORD'S LIABILITY

As explained in Chapter III., there is, as a general rule, no liability on the part of the landlord for accidents happening to his tenant, or to the guests or servants of the tenant, by reason of the premises being in a dangerous or unsafe condition.

Thus, in the case of *Lane* v. *Cox*,[1] where a workman employed by a weekly tenant of a house was injured owing to a defective staircase, and sued the landlord for damages for the injuries which he alleged he had suffered owing to the landlord's negligence, it was held that the landlord was not liable. There was evidence that, at the time the house was let, the stair case was in an unsafe condition, but there was no contract to repair on the part of either the landlord or the tenant, and consequently the landlord was not liable by contract either to his tenant or to the injured workman.

Liability for negligence can only arise when the defendant (in this case the landlord) owes some duty to the injured person, and that duty has been neglected.

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[1] [1897] 1 Q.B. 415.

"There are many circumstances that give rise to such a duty, as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So if a person has a house near a highway, a duty is imposed on him towards persons using the highway; and similarly there is a duty to an adjoining owner and occupier; and if by the negligent management of his house he causes injury, in either of these cases he (the owner) is liable. In this case the negligence alleged is the letting of the house in an unsafe condition. It has been held that there is no duty imposed on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant, there cannot be a duty to a stranger.[1]

Neither is the wife of a tenant in a better position than a servant or guest of the tenant, to sue the landlord for damages for injuries sustained owing to dilapidations.

For instance, in *Cavalier* v. *Pope*,[2] the landlord, through his agent, had agreed with the tenant to repair a kitchen floor which was defective. The tenant's wife, who was well aware of the defect, fell through the flooring and was injured, and sued the landlord for damages. The House of Lords, affirming the decision of the Court of Appeal, held that the wife had no claim against the landlord, being a stranger to the contract to repair which had been made with her husband (the tenant), and upon which the wife could not sue.

When the landlord has expressly contracted to repair, and a third person is injured on account of the dilapidated condition of the premises, the landlord will be

[1] Per Lord Esher, M.R., *Lane* v. *Cox*, *ante*, [1897] 1 Q.B., at p. 417.

[2] [1906] A.C. 428.

liable,[1] provided that his attention has been called to the defect in question, or if he could have known of its existence by the exercise of ordinary care,[2] and he neglects to remedy it.

Whether or not this principle still holds good since the passing of the Housing and Town Planning, etc., Act, 1909, is difficult to say, as no cases on the point have yet arisen; but it is submitted that in the case of houses coming within the scope of that Act, the landlord having a statutory right to enter and view the state of repair, must be taken to know the condition of the premises, and will therefore, under his implied contract, be liable to third persons, as well as to the tenant, if the premises are out of repair.

When he has not covenanted to repair, a landlord will only be liable for injuries to a stranger when he has been guilty of misfeasance (*i.e.*, a wrongful act), as, for instance, when he lets premises in a ruinous condition.[3]

The landlord will also be liable to persons to whom he owes a duty, and who are injured, if he knowingly lets premises in such a ruinous condition as to amount to a nuisance. He will therefore be liable to an adjoining owner, or to a person lawfully using the highway, who may suffer injury owing to such nuisance. For instance, where a landlord let to a tenant a building having a stack of chimneys which were known to the landlord to be ruinous and in danger

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[1] *Payne* v. *Rogers*, (1794) 2 H. Bl. 349.

[2] *Tredway* v. *Machin*, (1904) 20 T.L.R. 726; *Broggi* v. *Robins*, (1899) 15 T.L.R. 224; *Gwinnell* v. *Eamer*, (1875) 10 L.R. Q.B. 545.

[3] *Nelson* v. *Liverpool Brewery Co.*, (1877) 2 C.P.D. 311, per Lopes, J., at p. 313.

of falling, and which subsequently, through no fault of the tenant, who had not covenanted to repair, fell and damaged the building of an adjoining owner, it was held that the landlord was liable although he was not the occupier of the premises at the time.[1]

So also, where a passer-by was injured through a defect in the condition of a coal plate in the pavement in front of a house let to a weekly tenant, and such defect, though not shown to have been in existence at the commencement of the tenancy, had existed for nearly two years before the accident, it was held that, having regard to the nature of the tenancy (a weekly tenancy being a re-letting of the premises by the landlord at the beginning of each successive week) there had been a re-letting of the premises after the nuisance was created, and that the landlord was therefore liable.[2]

But the landlord will not be liable for a nuisance to the highway existing on such premises at the time of the letting if the tenant is, by his lease, under an obligation to repair.[3]

Again, where the landlord let a building in flats and retained possession and control of the staircase, and, owing to one of the stairs being worn and defective, a person visiting one of the tenants of the flats fell and was injured, it was held that there was by necessary implication an agreement by the landlord with his tenants to keep the staircase in repair; and inasmuch as the landlord must have known and contemplated that it would be used by persons having

[1] *Todd* v. *Flight*, (1860) 9 C.B. N.S. 377.

[2] *Sandford* v. *Clarke*, (1888) 21 Q.B.D. 398.

[3] *Gwinnell* v. *Eamer*, *ante*.

business with them, there was a duty on his part to keep it in a reasonably safe condition, and that therefore the landlord was liable.[1]

The owner of an empty house will not be liable for injuries to third persons if he has taken reasonable care to prevent the premises from becoming a nuisance (that is, dangerous to persons using the highway), and was not aware of such defective condition, and if sufficient time has not elapsed for him to have found it out by using ordinary care.

Therefore, in a recent case, where one of the upright bars of an area railing to an empty house had been broken by boys playing football in the street, and a child got through the gap and was clambering along inside the railing when he fell and was injured, it was held that the owner of the house was not liable for damages sustained in consequence of the alleged nuisance. On appeal, the Court held that the alleged nuisance could not be regarded as the cause of the child's injuries, as he did not fall through the gap in the railings while using the highway, but got through the gap in order to clamber along inside.[2]

THE TENANT'S LIABILITY.

There is no duty on the part of the occupier of premises to render them secure for persons using them for their own gratification without invitation;[3] but in the case of premises adjoining a highway, it is the tenant who is *primâ facie* liable to the public for injuries suffered owing to non-repair, unless the tenant can show

[1] *Miller* v. *Hancock*, [1893] 2 Q.B. 177.

[2] *Barker* v. *Herbert*, [1911] 2 K.B. 633.

[3] *Jewson* v. *Galti*, (1885) 1 Cab. & El. 564.

that the landlord is under an express or implied contract to repair, and has had notice of the non-repair. For instance, where a tenant held premises under a lease in which he had covenanted to repair, and owing to a defective coal plate a passer-by fell and was injured, and brought an action against the landlord, it was held that, the obligation to repair being cast upon the tenant by the lease, the landlord was not liable for the accident.[1]

It is the duty of an occupier of a house having an area, fronting the public street, so to fence it as to make it safe for persons using the highway.[2] He must also keep fences in repair so that cattle cannot stray on to the land of others.[3]

The tenant may even be liable to passers-by when he has employed a contractor to repair defects, and damage results from the negligence of the contractor. For example, where a heavy lamp, projecting over the foot-path, fell and injured a foot passenger, the Court held that it was the tenant's duty to maintain the lamp so as not to be dangerous to the public; and if it caused injury owing to want of repair, it was no answer on the part of the tenant that he had employed a competent and experienced gas-fitter to repair it and that the latter had been negligent.[4]

In the absence of negligence, a tenant of a second floor was held not liable for damage caused to the goods of a tenant of the ground floor by water which overflowed from the pan of his water-closet and oozed

[1] *Pretty* v. *Bickmore*, (1873) 8 C.P. 401.

[2] *Coupland* v. *Hardingham*, (1813) 3 Camp. 397.

[3] *Cheetham* v. *Hampson*, (1791) 4 T.R. 318.

[4] *Tarry* v. *Ashton*, (1876) 1 Q.B.D. 314.

through. It appeared that the tenant of the second floor did not know that the valve of his closet was out of order, and it was held that there was no obligation on him, under all circumstances and at all hazards, to keep the pipes from overflowing and his room watertight.[1]

Nor will a tenant be liable to his guests, or to persons on his premises by his consent, if they sustain injury owing to the premises being in a state of disrepair, unless negligence on the part of the tenant is proved.

[1] *Ross* v. *Fedden*, (1872) 7 L.R. Q.B. 661; 41 L.J. Q.B. 270.

CHAPTER IX.

REMEDIES FOR BREACH OF CONTRACT TO REPAIR.

THE TENANT'S REMEDIES.

In the case of **Furnished Houses,** as already explained in Chapter III., the tenant's remedy for breach by the landlord of his *implied* contract that the premises are fit for habitation at the time of letting, is to quit. Or, if the tenant has suffered injury owing to the breach of this implied contract, he can sue the landlord for damages.

In the case of **Unfurnished Houses coming within the provisions of the Housing and Town Planning, etc., Act, 1909** (*see* Chapter III., p. 34), the tenant's remedies are similar, except that the landlord's implied contract under this Act continues during the whole of the tenancy. In addition, the tenant can, if he chooses, report the condition of the house to the Local Authority, who, if it appears to them to be necessary, shall, by written notice, require the landlord within a reasonable specified time, not being less than twenty-one days, to execute such works as they shall specify in the notice, as being necessary to make the house in all respects reasonably fit for human habitation. If the landlord fails to comply with this notice, the Local Authority can do the work and recover the cost from him.

In the case of other unfurnished houses, the tenant has an indirect remedy by giving notice to the Local Authority when a nuisance is caused by defective drains, etc., as under the Public Health Act, 1875,[1] or under the Public Health (London) Act, 1891,[2] the Local Authority can serve notice on the owner, and if the defect is not remedied within a certain time, they can carry out the work and recover the expenses from the owner. The owner may, however, recover such expenses from the tenant if the latter has, in his lease, agreed to pay them. This liability is dealt with in a later chapter.

When the landlord expressly agrees to repair, the tenant cannot sue him for breach of such agreement until after the landlord has had notice of the lack of repair and has failed to remedy it, as already explained in Chapter V. Neither is the tenant entitled to quit because of such non-repair.

THE LANDLORD'S REMEDIES.

The remedies open to the landlord are three:—

1. He may bring an action for damages.
2. He may enter the premises and carry out the necessary repairs and sue the tenant for the cost. This remedy, however, is only possible when a right to enter and repair has been expressly reserved in the lease.
3. He may re-enter upon the premises and obtain forfeiture of the lease. This remedy also is only possible if the lease provides for forfeiture for breach of covenant.

[1] 38 & 39 Vict. c. 55.

[2] 54 & 55 Vict. c. 76.

1. **An action for damages** for breach of a repairing contract may be brought at any time during the lease, or after the lease has expired. If the tenancy is under "an agreement," the action will be on the simple contract to repair. If the lease is under seal, the action will be on the covenant to repair and may be brought at any time within twenty years after the breach; whereas in the case of breach of a simple contract the action must, under the Statutes of Limitation, be brought within six years. This distinction is of little importance, since in practice the action is usually brought soon after the breach.

An action can also be brought against the tenant for breach of the *implied* contract to keep in repair; but this seldom arises in practice, since nearly all leases contain an express contract to repair, for breach of which contract an action can be brought.

If during a lease the landlord considers that repairs are necessary, or if the lease is terminating, shortly before such termination, he gives the tenant notice that he or his surveyor intends going over the property on a certain date in order to examine the state of repair and to see whether the covenants contained in the lease have been carried out. The landlord can only enter and view as to state of repair if a proviso entitling him to do so has been reserved in the lease, and practically every lease or agreement contains such a proviso. Without it the landlord would be liable to an action for trespass if he wrongfully entered the premises for this purpose.

The tenant often appoints a surveyor to meet the landlord's surveyor and go over the premises with him and agree (if possible) what is the extent of the tenant's liability for defects or necessary repairs due to the

failure of the tenant to fulfil his obligation under his repairing covenant. Or, the landlord and tenant may agree to abide by the report and valuation of the cost of repairs, to be made by a surveyor mutually agreed upon, in which case both will be bound by such valuation. More often, perhaps, the schedule of repairs is prepared by the landlord's surveyor and also an estimate of their cost, which amount is claimed from the tenant, who, if he considers it unreasonable appoints another surveyor to investigate the claim on his behalf. In many cases a settlement can be arrived at between the two surveyors, or, as is very often done, the points in dispute are referred to the decision of a third surveyor acting as arbitrator. If, however, a settlement is impossible, the landlord commences an action to recover damages for breach of the agreement to repair, and the matter is decided by the Courts. If the amount claimed does not exceed £100, the action can be tried in the County Court; if over that amount, in the High Court, unless the parties consent to the jurisdiction of the County Court. Or the parties can agree to settle the dispute by arbitration. When an action of this kind is brought in the High Court it is usual for the Court to refer it to an Official Referee (a permanent officer of the Court) to assess the damage, or to a Special Referee (generally an architect or surveyor appointed for that purpose by the Court). If the action is brought in the County Court it can only be referred to a referee by consent of both parties.

THE MEASURE OF DAMAGES FOR NON-REPAIR.

(*a.*) **If the Lease is still running,** the action in this case is brought on the contract or covenant to keep the premises in repair. It is impossible to lay down any

hard and fast rule as to what damages may be recovered by the landlord, as all the circumstances of each case must be taken into consideration. The damage should be such a sum as reasonably represents the damage which the landlord has sustained by the breach of covenant, or, in other words, the amount by which his reversion is depreciated in market value. Obviously this amount will vary according to the length of time the lease has still to run. For instance, in the case of a 99 years' lease with 96 years still unexpired, if the tenant neglects to repair, it would, at that date, make very little difference to the value of the reversion, and the amount of damages recoverable would be very small; whereas supposing, in the same case, 96 years had expired and the property was going to revert to the landlord in three years' time, then the neglect of the tenant to repair might cause serious injury to the value of the landlord's reversion, and the amount of damages would be almost the actual cost of the necessary repairs. In order to arrive at the depreciation in value of the reversion, it is necessary to determine—What is the value of the reversion with the repairing covenant observed, and what is the value of the reversion with the covenant disregarded? and the difference between these two sums will be the loss which the landlord has sustained in respect of his reversion.

In the case of *Ebbetts* v. *Conquest*,[1] the plaintiffs were trustees, under the Will of a deceased tenant, of certain premises held for a term of 61 years from 1837. An under-lease for the whole term (less ten days) had been granted to one of the defendants, the other defendant being the assignee of the under-lease. Both the lease

[1] [1895] 2 Ch. 377, C.A., affirmed by House of Lords, [1896] A.C. 490.

and the under-lease contained substantially the same repairing covenants, and this action was brought by the plaintiffs to recover damages for breach of the covenant to keep in repair. It was not denied that there had been a breach, and by order of the Court the matter was referred to the Official Referee to assess the amount of damages. Evidence was given to show that at the end of the term, the site, to be of any value, would have to be cleared, the only profitable way of dealing with it being to treat it as a building site, the buildings being only fit to be pulled down. The evidence went to show that if the buildings were put into repair they would be worth £200 more to pull down and carry away than if not put into repair. The defendants contended, therefore, that at most the value of the plaintiffs' (the under-lessors) reversion had only been diminished to the extent of £200 by the want of repair. The Official Referee did not adopt this view, but held that as the plaintiffs at the expiration of their lease would, under the covenants of the original lease, have to pay the full expense of putting the buildings into proper repair, that expense must be taken into account in assessing the damage they had sustained. He therefore assessed the damage on this principle:

The term was very nearly at an end—it had three and a-half to four years to run. The value of the ten days' reversion (reserved in the under-lease), if the property was in repair, would be so much; if the property was out of repair it would be so much; and the difference was the amount of damage sustained by the reversion. He held that the expense of putting the buildings in repair would be £1,500; but allowing a discount for the time to elapse before that sum would become

payable, he assessed the damages at £1,305. This decision was appealed against, but the principle adopted by the Official Referee was upheld by the Court of Appeal and subsequently by the House of Lords.

It should be noted that this case was between the tenant and under-tenant, and that the liability of the tenant to his own landlord under the original lease must be taken into account. In this case it was known to the under-tenant that his immediate landlord (the original tenant) was liable to yield up the premises in repair, and therefore this was one of the circumstances to be considered in the assessment of damages. Had the same dispute arisen between freeholder and tenant, probably the £1,305 would not have been the measure of damage to the reversion; possibly the freeholder would only have recovered nominal damages; but, as before stated, it is impossible to lay down any general rule, as the amount recoverable is not limited to nominal damages, even where the length of the unexpired term is so great that no real damage can be proved, or when the accumulated proceeds from investing a nominal sum would, at the end of the lease, provide more than a sufficient fund.

In an action to recover possession of premises let on a ninety-nine years' lease, for breach of covenant to repair, where the dilapidations consisted chiefly of defective plastering and cracks in the walls and ceilings, and also holes in the walls caused by driving in nails, and the tenant was asked to do all the repairs which would ordinarily be done at the end of the seven years' period fixed by the lease for the external painting, Mr. Justice Cave said he should not hold a house out of repair because a dozen cracks appeared in the

plastering, which did not interfere with the stability of the structure. It was a monstrous thing to say that because a person put nails into the wall of a house he must take them out and fill up the holes, or commit a breach of the covenants of a repairing lease.[1]

BREACH OF COVENANT CONTAINED IN UNDER-LEASE.

In a case[2] where a landlord gave notice to his immediate tenant to repair, at the peril of forfeiting his lease for breach of covenant, the tenant, who had under-let part of the premises, thereupon gave his under-tenant a similar notice to repair within three months. The under-tenant, however, neglected to do so, whereupon the original tenant, in order to prevent a forfeiture of his whole estate, entered and put the premises in tenantable repair. It was held that though he might be a trespasser for so doing, yet he might recover from his under-tenant the whole expense incurred, although the latter had sold his interest in the premises to a purchaser, who had entirely rebuilt them before the action for the recovery of such expense was brought.

In another similar case[3] where the tenants were required to repair within three months of notice to do so, and they had sub-let, the under-lease containing a covenant by the under-tenant to repair within *two* months of the notice to repair, notice was given to the under-tenant, but before the expiration of the two months the tenants, in order to avoid a forfeiture, entered and did the repairs themselves, and then during

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[1] *Perry* v. *Chotzner*, (1893) 9 T.L.R. 488.

[2] *Colley* v. *Streeton*, (1823) 2 B. & C. 273.

[3] *Williams* v. *Williams*, (1874) 9 L.R. C.P. 659; 43 L.J. C.P. 382.

the continuance of the under-lease sued the under-tenant for breach of covenant. The Court held that they could only recover nominal damages, since by having done the necessary repairs they had, at the time the action was brought, sustained no injury to their reversion, the action having been brought too soon.

In an action [1] for damages for breach of covenant to repair contained in an under-lease, owing to which it was alleged that the under-lessors' term had been forfeited, it was held that the latter could not recover from the under-tenants damages for the loss of their term, since the superior landlord had brought his action for ejectment not only on the ground of breach of the covenant to repair, but also for breach of another covenant not contained in the under-lease. It was, however, held that the under-lessors could recover from the under-tenants the amount of the dilapidations accrued at the time of ejectment, notwithstanding the determination of their own term.

(*b.*) **When the Lease has come to an end.**—When an action is brought at the end of a lease, on the contract to yield up, or to leave, in repair, the measure of damages which the landlord can recover is the reasonable and proper amount necessary to put the premises into the state of repair in which they ought to have been left in accordance with the repairing covenant,[2] regard being had to the class of property and its age. In addition to this, the landlord is entitled to compensation for the loss of the use of the premises

[1] *Clow* v. *Brogden*, (1840) 2 M. & G. 39.

[2] *Joyner* v. *Weeks*, [1891] 2 Q.B. 31.

while they are under repair, but this compensation would not necessarily be the full rent of the premises during that time.[1]

Even if the landlord pulls down the building after the termination of the lease, the tenant's liability is unaffected,[2] and so also if during the lease the landlord has granted to a new tenant a lease, which is to commence immediately after the expiration of the former one, wherein the new tenant has covenanted to pull down and alter part of the premises and also to keep them in repair. The contract between the landlord and a third person cannot be taken into account, and does not in any way affect the obligations of the tenant under his repairing covenant.[3]

This rule of law may at first sight appear an inequitable one, especially where a large sum has to be paid by the tenant for repairs which the landlord never intends to execute, as, for instance, when he intends pulling down the house. The difficulty, however, is this—that but for this rule, a tenant who has broken his contract might be in a better position than a tenant who has kept it, a result which the Courts would not encourage. The Court of Appeal have, therefore, adopted what they consider to be the only workable rule under such circumstances.

A landlord is not bound to expend on repairs the damages which he has recovered during a lease under

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[1] *Woods* v. *Pope*, (1835) 6 C. & P. 782; *Birch* v. *Clifford*, (1891) 8 T.L.R. 103.

[2] *Inderwick* v. *Leech*, (1884) 1 T.L.R. 95, 484.

[3] *Joyner* v. *Weeks*, *ante*.

a covenant to *keep* in repair, and at the end of the lease he may bring another action on the covenant to *leave* in repair.

In *Henderson* v. *Thorn*[1] the landlord had previously brought an action against the tenant during the term, to recover damages for breach of the covenant "to keep" in repair. The tenant then paid into Court the sum of £235, which was accepted by the landlord in satisfaction, and the action was discontinued. After the expiration of the term the landlord brought a fresh action to recover damages for breaches of the covenant to keep "and leave" in repair. The particulars of claim included items of non-repair in respect of which a claim had been made in the first action, and also additional items arising since the date of that action. The case was sent to the Official Referee, who, in assessing the damages, found that the sum of £571 5s. was required to repair the premises at the end of the lease, and from this he deducted the amount paid into Court and accepted by the landlord in the first action, and also the sum of £23 for such depreciation as would have accrued, had the covenant been performed on the first occasion, between that date and the end of the term. On appeal the Court decided that the method of the Official Referee was right, and that the money paid into Court in the first action must be taken to have been paid in and accepted as damages for injury to the reversion, and not as being the sum then required to put the premises into repair, whereas in the second action the sum recoverable was that required to put the premises into repair.

[1] [1893] 2 Q.B. 164.

2. **The Right to Enter and Repair.**—Apart from an express stipulation in the lease, and from the right given him under certain Acts of Parliament, the landlord has no right to enter his tenant's premises, either to view the state of repair or to effect the repairs. A landlord who, in the absence of such stipulation, enters upon the demised premises to repair them on breach of the tenant's covenant to repair, commits a trespass which will be restrained by injunction,[1] notwithstanding that under a superior lease the landlord is liable to forfeiture for non-repair, and he enters by leave of weekly sub-tenants.

When, however, the right to enter and repair is reserved to the landlord, he may do so, and can recover from the tenant, by action, the cost of repairs which the tenant was liable to execute under his repairing covenant.

Under the Agricultural Holdings Act, 1908,[2] s. 24,

"The landlord of the holding or any person authorised by him may at all reasonable times enter on the holding for the purpose of viewing the state of the holding."

By Section 15 (2) of the Housing and Town Planning, etc., Act, 1909,[3]

"The landlord or the local authority or any person authorised by him or them in writing, may at reasonable times of the day, on giving twenty-four hours' notice in writing to the tenant or occupier, enter any house, premises, or building to which the section applies, for the purpose of viewing the state and condition thereof."

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[1] *Stocker* v. *Planet Building Society*, (1879) 27 W.R. 877.

[2] 8 Edw. VII., c. 28.

[3] 9 Edw. VII., c. 44.

Under the London Building Acts (Amendment) Act, 1905,[1] s. 15,

"For the purpose of carrying out or maintaining any work required to be done or maintained by the owner under any of the provisions of this Act"

ADDENDUM.

Line 5. After "rent" *read* "and others specified in sub-sections 6 and 8."

"it shall be lawful for the owner of any building, notwithstanding any provision to the contrary contained or implied in any lease or contract affecting such building, to enter such building or any part thereof and do all such things therein or in relation thereto as may be necessary or proper in that behalf."

And by Section 24 (*h*) the tenant is liable to a penalty if he prevents the landlord from entering for these purposes.

3. **Re-entry and Forfeiture.**—Most leases contain a proviso that, in the event of breach or non-observance by the tenant of any of the covenants and agreements contained therein, it shall be lawful for the landlord to re-enter and take possession of the premises. Formerly when such a proviso existed and a breach of the repairing or other covenants occurred, the landlord (or his assigns) might at once re-enter, or if the tenant refused to peaceably admit him, the landlord might bring what is now technically known as "an action for the recovery of land," formerly and still popularly called "an action of ejectment."

[1] 5 Edw. VII., c. 209.

This, however, was in many cases a great hardship on the tenant, and now, by the Conveyancing and Law of Property Act, 1881,[1] s. 14, the landlord's right of forfeiture for breach of covenant (other than the covenant to pay rent) is not enforceable either by peaceable re-entry or by bringing an action[2] until the landlord has served on the tenant a written notice specifying the particular breach complained of and requiring the tenant to make compensation in money for such breach, and the tenant has failed to remedy the breach and make compensation within reasonable time. A "reasonable time" is, in practice, generally taken to be three months. Under the same section the Court may, on the application of the tenant, grant relief against forfeiture on such terms as it thinks fit.

Section 14 of the Conveyancing and Law of Property Act, 1881, is as follows:—

(1).—A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2.)—Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture,

[1] 44 & 45 Vict., c. 39.

[2] *Riggs, In re; Ex parte Lovell*, [1901] 2 K.B. 16.

the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

(3.)—For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid and his heirs and assigns.

(4.)—This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

breach before action is brought. The notice may be left at or affixed to the premises or sent by registered post. It need only be addressed to "The Lessee," without his name. A mere general notice of breach of a specified covenant is not sufficient. For instance, where a notice by the landlord to the tenant was as follows: "You have broken the covenants for repairing the inside and outside of the houses, Nos. 10, 11, 12, etc., Blank Street, contained in a lease of the said premises, dated, etc.," and claiming £20 compensation, an action to recover possession and also damages for breach of covenant was dismissed, on the ground that notice "specifying the particular breach of covenant complained of" had not been given.[1] In a later case it was for the same reason held that a notice to the tenant "that you have not kept the said premises well and sufficiently repaired and the party and other walls thereof," was insufficient, and the fact that such a notice sufficiently specifies other breaches of covenant which are complained of will not make the notice sufficient.[2]

But a notice referring to several distinct alleged breaches of covenant is not altogether invalidated because it transpires that, although some of the alleged breaches have occurred, the others have never taken place, or that the landlord is not entitled to rely on them.[3] A notice under this section requiring the tenant to remedy a breach of covenant will be good even if it does not require payment of compensation in money.[4]

[1] *Fletcher* v. *Nokes*, [1897] 1 Ch. 271.
[2] *Serle, In re; Gregory* v. *Serle*, [1898] 1 Ch. 652.
[3] *Pannell* v. *City of London Brewery Co.*, [1900] 1 Ch. 496.
[4] *Lock* v. *Pearce*, [1893] 2 Ch. 271.

From the foregoing it will be apparent that the notice of breach of covenant to repair should always be followed by a schedule of the required repairs.

The form of Notice is generally to the following effect:—

To John Jones and all parties interested.

I HEREBY GIVE YOU NOTICE that you have committed breaches of the covenant to repair the house, *No. 10, Blank Street*, which you hold of me under a lease dated the *5th day of April, 1904*, containing such covenants. The particulars of the said breaches are specified in the Schedule hereto.

AND I hereby require you, within *three* calendar months from the date of this Notice, to remedy the said breaches [and to pay me the sum of *£20* as compensation for the same].

(Signed) *RICHARD SMITH.*

Dated this *11th day of August, 1911.*

The SCHEDULE above referred to.

[*For specimen Schedule see Chapter* XII.]

A proviso in a lease, giving the landlord a right to re-enter for breach of covenant, does not deprive him of his right to bring an action for damages for breach of covenant.

The breach of a covenant "to repair and *keep* in repair" is a *continuing* breach, *i.e.*, one which goes on and is added to from day to day; as opposed to a breach committed by one definite act on the part of the tenant, *e.g.*, where he assigns his lease or sub-lets contrary to covenant, or fails to *put* premises into repair in accordance with his repairing covenant, which would be a non-continuing breach. Under a covenant "to repair and keep in repair," a tenant must have the premises in repair at all times during the term, and if at any

time they are out of repair he is guilty of a breach of covenant, for which, if the lease so provides, the landlord can, after due notice, claim forfeiture, or he may bring an action for damages, either during the continuance or after the termination of the lease.

Where a lease contained a general covenant to keep in repair and a covenant to repair within three months after notice, and the premises being out of repair, the landlord gave the tenant notice under Section 14 of the Conveyancing Act, to repair within three months. Three days before the expiration of the notice a quarter's rent became due. The tenant failed to comply with the notice, and the landlord brought an action to recover possession, the quarter's rent, and damages for breach of covenant. The Court held that as the breach of covenant was a continuing one, no new notice was required in respect of the non-repair after the expiration of the time specified in the notice, and that the claim for rent did not affect the right to possession in respect of non-repair after the date when the rent became due.[1]

Where the breach of covenant is not a continuing one, a right of re-entry is waived by the landlord bringing an action for rent accruing subsequently to the breach, with a knowledge of its existence,[2] as, for instance, after a breach of a covenant to *put* premises into repair forthwith.

A covenant to erect certain buildings within twelve months is not a continuing covenant, even though it is followed by a covenant to keep the premises "so to be erected as aforesaid in good and substantial repair."

[1] *Penton* v. *Barnett*, [1898] 1 Q.B. 276.

[2] *Dendy* v. *Nicholl*, (1858) 4 C.B. (N.S.) 376.

In an action, after a notice had been given under Section 14 of the Conveyancing Act, 1881, to recover possession for breach of such a covenant to build, but the notice did not mention the breach of the repairing covenant, the Court held that the notice was insufficient, and the action failed, as the breach of the covenant to build had been waived by the receipt of rent after the expiration of the twelve months.[1]

The acceptance of rent after service of a notice to repair would not act as a waiver of a subsequent right of re-entry arising from non-compliance with such notice[2]; but in receiving rent from a tenant upon whom such a notice has been served, it is a good practice to give the receipt "without prejudice to the notice to repair."

The case of an under-tenant whose under-lease is liable to forfeiture, owing to the forfeiture of the head-lease for breach of covenant, is specially dealt with by Section 4 of the Conveyancing and Law of Property Act 1892,[3] which provides that where a landlord is proceeding to enforce a forfeiture the Court may, on the application of the under-lessee of the whole or any part of the property comprised in the lease, either in the landlord's action (if any), or in any action brought by the under-lessee for that purpose, make an order vesting for the whole term of the lease, or any less term, the property comprised in the lease, or any part thereof, in any such under-lessee, upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving

[1] *Jacob* v. *Down*, [1900] 2 Ch. 156.

[2] *Doe* d. *Rankin* v. *Brindley*, (1832) 4 B. & Ad. 84.

[3] 55 & 56 Vict. c. 13.

security, or otherwise, as the Court in the circumstances of each case shall think fit; but in no case shall the under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original under-lease.

When the Court, under Section 14 of the Conveyancing Act, 1881, grants relief against forfeiture for a breach of covenant to repair, the effect of the order of the Court is to continue the original lease for all purposes, so that an under-lessee continues liable on the covenants in his under-lease, notwithstanding the issue of the writ to recover possession by the superior landlord.[1]

The foregoing are the only remedies open to a landlord, and it seems that the Courts will never order specific performance of a covenant to repair, since damages will adequately compensate the landlord for non-performance of such a covenant.

COST OF PREPARING SCHEDULE, ETC.

A landlord is not entitled to recover from his tenant the expenses incurred in employing a surveyor to prepare a schedule of repairs, unless (1) the tenant has expressly agreed to pay such expenses, or (2) when a right of forfeiture for breach of covenant has been waived by the landlord in writing, at the request of the tenant, or (3) when a tenant is relieved from forfeiting his lease by the Court. In both the latter cases the expenses of employing a solicitor or surveyor can be recovered from the tenant under Section 2 (1) of the Conveyancing and Law of Property Act, 1892, which is as follows:—

"A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reason-

[1] *Dendy* v. *Evans*, [1910] 1 K.B. 263.

able costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act."

But an under-tenant (even of the whole of the premises included in the head-lease) is not, as between himself and the original landlord, a "lessee" within the meaning of this sub-section, and therefore the landlord cannot recover from him the costs of a solicitor and surveyor incurred in preparing a Schedule of Repairs.[1]

In a case where the landlord sought to recover such expenses incurred in respect of the preparation of a notice of breach of covenant, required by Section 14 (1) of the Conveyancing and Law of Property Act, 1881, as "compensation" for which the tenant is liable in lieu of forfeiture, the Court of Appeal held that such expenses arose "not from the breach of the covenant, but solely from the fetter which the wisdom of the Legislature has imposed on the enforcement of the cause of action arising from that breach,"[2] and the tenant was, therefore, not liable for them.

[1] *Nind* v. *Nineteenth Century Building Society*, [1894] 2 Q.B. 226.

[2] Per Fry, L.J., *Skinners' Company* v. *Knight*, [1891] 2 Q.B., at p. 545.

CHAPTER X.

FIXTURES.

It is necessary to touch briefly upon the question of fixtures, inasmuch as in preparing schedules of repairs it is often essential to be able to determine whether fixtures have or have not been wrongfully removed.

By the word "fixtures" is meant articles of a chattel or personal nature which have become affixed to land, and which may or may not be removed by the person who has affixed them, according to circumstances. It is, therefore, always advisable to qualify the word "fixtures" so as to show clearly which kind of fixtures is intended. There are two main classes of fixtures, viz.:—"Landlord's fixtures" and "Tenant's fixtures." "Landlord's fixtures" are such things as have been fixed by the landlord or his predecessor in title, or by a previous tenant, and which the latter has neglected, or was not entitled, to remove; and also such fixtures as have been put up by the present tenant during his term, but which he has no right to remove. "Tenant's fixtures" are chattels annexed to the freehold by a tenant during his term, either for the purposes of agriculture or trade, or for his own convenience, or for ornamentation, and which are removable by him during his tenancy, in the absence

of agreement to the contrary, and provided the degree of annexation is not such that serious damage will be done to the freehold by such removal. For instance, where, during a lease, a tenant had erected lime kilns, and at the determination thereof entered into a new lease containing a general covenant to repair the premises and leave in repair, "together with all erections and buildings," it was held that the fixtures passed with the second demise, and that the tenant could not remove the fixtures at the end of the second term without committing a breach of covenant[1]; but in a recent case it was laid down by the Court of Appeal, that "if the landlord wishes to restrict his tenant's ordinary right to remove trade machinery or fixtures attached to the demised premises, . . . so as to be more conveniently used, and not placed there as an addition or improvement to the premises, the landlord must say so (in the lease) in plain language. If the language used leave the matter doubtful, the ordinary right of the tenant to remove trade fixtures will not be affected."[2]

Agricultural fixtures are dealt with in Chapter XV.

With regard to the removal of articles put up for ornamentation or domestic convenience, it should be remarked that the right to remove them depends on whether their separation would cause little or no damage to the freehold, or to the articles removed. As a matter of practice, however, it is usually held that a tenant may remove any fixture of this kind,

[1] *Thresher* v. *East London Water Works Co.*, (1824) 2 B. & C. 608.

[2] *Lambourn* v. *McLellan*, [1903] 2 Ch., at p. 277, per Lord Justice Vaughan Williams.

but he is liable to repair any damage to the fabric caused by the removal of the fixture; also, where he has put up an article in the place of some fixture which was attached to the premises when he received possession, the tenant, when removing his own fixtures, must replace the original article or one of the like description.

Where chattels have been annexed in such a way as to become part of the freehold, or are permanent improvements, and consequently irremovable according to law, a landlord may maintain an action for waste against a tenant who wrongfully removes them. Or, if the removal is a breach of some covenant relating to fixtures, he may sue the tenant for such breach.

The Criminal Law relating to theft of, or malicious damage to, fixtures respectively, has already been considered in Chapter II., pp. 18 and 30.

CHAPTER XI.

SCHEDULING DILAPIDATIONS AND WASTE.

In preparing a schedule of repairs, it is necessary to know, and a surveyor should inquire, whether the lease has expired, or whether it is continuing, in which case an "interim" schedule is required. He should also ascertain, by examining the lease, whether or not the landlord has reserved a right for himself or his agents to enter the premises for the purpose of viewing the state of repair, as without such a right the surveyor would be a trespasser, and before entering the premises it would be necessary to obtain permission from the tenant.

Even if the landlord has reserved the right to enter and view the state of repair, as a matter of courtesy it is usual for the surveyor to write and inform the tenant that he proposes doing so on a certain date, and asking whether that date will suit the convenience of the tenant.

In the case of houses coming within the provisions of the Housing and Town Planning, etc., Act, 1909, the landlord, or any person authorised by him, is entitled to enter such premises and view the state of repair at any reasonable time on giving twenty-four hours' notice to the tenant.

In determining questions of dilapidations it is necessary for the surveyor to bear in mind several practical considerations:—

(1.) He should first of all examine the lease or agreement, or a copy thereof. The repairing covenants should be carefully studied, and a note made as to what the tenant has agreed to do in the way of repairs.

(2.) The existence of any customs, local or otherwise. There is, for example, a custom in London, with regard to houses let for short terms, that the tenant should in no way be liable for external repairs, unless, of course, he has contracted to do them.

(3.) The character of the premises, their age, and the class of neighbourhood in which they are situated.

(4.) The circumstances of the letting, *i.e.*, the age and condition of the premises at the time of letting, and any circumstances connected with the letting on which information can be obtained. Thus a tenant leasing old premises would, as a general principle, incur less liability than a tenant leasing new premises, and would, generally, only be required to keep them in repair *as old premises.*

(5.) If the covenant is to keep or to leave in "tenantable (or other similar expression) repair," what repairs will be necessary in order to satisfy a reasonably-minded incoming tenant of the class likely to take the premises.

(6.) If the lease is still running the surveyor should also ascertain whether he has a right to enter the premises, as already explained, and whether notice to repair has been given to the tenant in accordance with the provisions (if any) of the lease, and whether the time allowed therein for executing the repairs by the tenant has expired. In preparing a claim for dilapidations during the continuance of a lease, the damages should be measured by the amount of injury the reversion has sustained, owing to the failure to repair on the part of the tenant, as explained in Chapter IX.

(7.) In settling a claim for dilapidations a tenant may not set off the value of any improvements, except, of course, in the case of an agricultural tenancy.

In dealing with dilapidation questions in practice it is absolutely impossible to lay down any certain method of acquiring a knowledge of the work. Common sense, knowledge, tact, and a ready judgment are the first essentials. To these must be added years of practical experience. Take, for instance, the case of brickwork. The joints of the brickwork may be sound, but the wall itself bulged; on the other hand, the wall may be to all appearance perfectly straight and sound, but the pointing may, for all that, be decayed and perished, and the wall absolutely rotten. It may be asked what amount of bulging in a wall would justify a surveyor in requiring it to be taken down and rebuilt. In some cases walls, say 30 feet in height, may be found overhanging to the extent of nine inches or more, and yet so sound and well preserved that it would be most unfair to call upon the tenant to rebuild. In other cases, walls of equal height, overhanging not more than three inches, may be in such a condition as to call for rebuilding. In a very large percentage of cases it will be found necessary to require the top few courses of brickwork to be taken down and rebuilt; and in old buildings this almost invariably applies to parapet and party walls above the roof.

The point to be looked for—and it will be clearly apparent to the practical surveyor almost immediately he enters the premises to be surveyed—is whether the tenant has been a reasonably careful one, who has used the tenement fairly, and preserved it with a reasonable amount of reparation.

In inspecting the premises it is usual for surveyors to deal with the dilapidations in a certain order. The following is the order usually observed, and a description of dilapidations to be looked for in each part of the premises is given :—

The Roof.

The chimney pots should be examined for the purpose of noting any cracked or broken pots or defective setting. The brickwork of chimney stacks, parapet walls and party walls should be carefully inspected, noting any brickwork out of upright or otherwise defective, together with any open or defective pointing to the brickwork. If any of the brickwork is rendered in cement, the condition of the rendering should be noted. The fall of the gutters, together with their condition, particular care being taken in observing the condition of any zinc work; if the fall of gutters is not correct it may generally be attributed to the sagging or decay of the wooden bearers. The condition of the lead cesspools should be noticed, also whether the gratings in outlets, or the wire covers (if any) are decayed. The slating, tiling, or other roof covering should be examined, the pointing of the tiles and the pointing at verges, etc., should be observed, slipped tiles or slates noted. Any sagging of the roof should be carefully noted; this, in some cases, may necessitate the complete restripping of the roof, the insertion of new rafters, etc. The condition of ridges, hips, valleys, hip irons, lead or zinc flashings, etc. Defective coping, broken stones, or defective cement work, particularly the condition of the cramps, should be looked to. The woodwork is often found to be decayed, more particularly that of skylights and trap-doors, these almost invariably being defective; likewise cistern tops, etc. Lastly, a note should be made of any paintwork.

It is often difficult to obtain access to the roof, and usually a very dirty job. It is, therefore, advisable for the surveyor when upon the roof, whether his instructions include the preparation of an estimate of the cost of repair

or not, to insert in his note-book the various measurements which would be necessary to enable him to prepare such an estimate.

Front and Back of House.

The condition of the brickwork, and whether bulged or not, the surveyor using his judgment as to when it is necessary to plumb the work; the condition of the pointing. It is usual in requiring re-pointing to note the style of this work, whether tuck-pointing, struck-pointing or whatever kind of pointing has been previously used. The pointing round the various windows and door openings should be particularly noted. The reveals, if cement, should be examined to ascertain whether they are sound or cracked, and if they have been previously painted. The condition of the various window sills. The general condition of the woodwork should next be noted. All stone steps, landings, etc., should be carefully examined; cracked and defective stones may require renewal, it often not being sufficient to have these cemented up. It may be necessary to consider whether cracks or defects are the result of settlement arising from inherent defects in the original construction of the building, and in such a case the question of the age and condition of the house at the commencement of the lease may arise. Defects to fences, gates, area walls, etc., should be noted; almost invariably garden walls will be found faulty. The condition of rain-water and soil pipes, eaves-gutters, outside shutters, sun blinds, etc., should be noted. Lastly, the condition of the outside paintwork should be recorded.

Internal Work.

It is usual to commence on the top floor of the house and work down to the basement. Each room is taken in succession, starting with the room on the left of the staircase and working "sun-wise," *i.e.*, from left to right, and the rooms should be dealt with in the same order, as nearly as may be, on each floor. The work in each room should be noted systematically, viz., the ceiling, whether the plastering is bulged, badly cracked, or in any other way defective; if very bad it may be necessary to investigate the condition of the lathing. Also the cornices should be noted.

Usually the formula, "wash, stop, claircolle and whiten ceiling" will be found sufficient. Often the ceiling will have been papered to hide defects. If an estimate is being prepared and measurements taken, the ceiling should be measured first and booked, since the length and breadth of it added together and multiplied by two will give the girth of the room, which, multiplied by the height, will give the gross area of the walls for papering, from which figure deductions are afterwards made for the door, window, and fireplace openings as each one is measured. Next the walls should be examined, noting the condition of the plastering, and also if the paper has been torn, or merely soiled. The window sashes and frames should be next examined, noting defective woodwork, broken sash lines, missing or defective fastenings, broken glass and faulty puttying. Next, the condition of the flooring, if of wood, whether it is worn or broken, noting any sagging of the joists. The skirting and other woodwork, whether defective or decayed, and, if the latter, whether resulting from neglect to paint. The effects of dry rot should be carefully looked for, particularly in basement houses. This is attributable to the formation and growth of a species of fungi. The cause, or perhaps it is more correct to say the condition essential to the development of this growth, is neglect to ventilate under the floors, and points to faulty original construction, which, however, can sometimes be remedied by the insertion of air bricks. Wet rot, on the other hand, is the result of a chemical decomposition, and its existence is clearly the result of permissive waste. Mantelpieces should be carefully inspected for cracks and chipping; and if of marble, whether pickling and cleaning are required. The condition of the front and back hearths, whether broken or otherwise defective. The condition of the stove or stoves. Lastly, the state of the paintwork. On leaving each floor it is usual to deal with the staircase leading from that floor, together with the landing, taking in order the ceilings and soffits, then the walls, following with a note of the condition of the handrail, balusters, etc., the treads and risers, noting whether worn or otherwise defective, faulty strings or other woodwork.

Note the state of windows on landings, etc., as also the doors of cupboards, etc., with the external faces of room doors.

See that keys are not missing, and whether door furniture is defective or needs relacquering. Try the electric and other bells, speaking-tubes, etc., and see if in working order.

Examine the bath, lavatory, and w.c. fittings. Try the water-waste-preventers (if the water is still laid on), and notice any cracks or other defects. Also the storage cisterns, whether it will be necessary to clean them out; the condition of the ball valves, etc. If the bath waste discharges into a rain-water head, see if choked with birds' nests, etc., and whether new gratings are required.

Drains.

The condition of the drains should be carefully examined, noting defective gullies and sanitary fittings, as also indications of defects in the soil-drains. If any indications of defects exist it is justifiable to call upon the tenant to open and examine the drains, repairing and cleansing the same if requisite. Most surveyors insert a clause in their schedules calling for this to be done, whether any defects are indicated or not; but they rarely get all they ask for. The manhole covers can sometimes be lifted up, and some slight idea as to the condition of the drains can, in this way, be obtained.

CHAPTER XII.

THE FORM OF SCHEDULE.

It would be impossible to lay down any one form of Schedule of Repairs which would be suitable for every case in which dilapidations occur. Every schedule must necessarily be varied to suit the class of property in question, and all depends on the repairing covenants in the lease under which the property is held, and which naturally govern the extent of the tenant's liability. It should be remembered that, in preparing a schedule, the surveyor is making a list of repairs rendered necessary by the tenant's neglect to fulfil his obligations under the repairing covenants of his lease, and it does not come within the surveyor's province to lay down detailed directions as to the manner in which such work shall be executed. The surveyor need not, in preparing the schedule, group the repairs under the various trades, but it may be convenient for him to do so, for the purpose of preparing his estimate of the cost of the works. The schedule is prepared for service upon the tenant, who is usually a person with little or no technical knowledge; therefore it should set forth as clearly and concisely as possible the various defects, specifying the rooms or other portions of the premises in which they exist. Many surveyors describe fully the value or quality of the new material with which they require defective portions reinstated,

e.g., "paper of the list price of 3s. 6d. per piece," or "paper of a similar value and quality to that now hung"; but this practice is of no great use, as, unless the repairing covenant specially provides for this, a tenant can ordinarily only be required to re-paper with paper of a quality suitable to the class of property.[1] If, after being served with a schedule, the tenant carries out the work, it is for the landlord's surveyor to say whether the defects have been properly remedied, and if he finds that paper-hangings have been used of such an inferior quality as to be unsuited to the class of house, he can require the removal of the inferior material, and the substitution of a paper of suitable quality.

The following is a specimen Schedule of Repairs served on a tenant at the expiration of a lease of a house in London let at £130 per annum. The repairing covenant provided for the tenant keeping the premises in good and substantial repair during the term, and painting at the usual intervals: the tenant covenanted to "deliver up the premises well and substantially repaired cleansed amended and kept" . . . "together with all marble and other chimney pieces dressers (and other specified articles) and all additions and improvements therein whole safe undefaced and fit for use." Only a few of the rooms are given, in order to avoid unnecessary repetition.

[1] See *Proudfoot* v. *Hart*, *ante*, p. 74.

SCHEDULE OF REPAIRS AND WORKS required to make good dilapidations to the premises, *No. 100, Blank Street, W.*, in accordance with the covenants of a lease dated *16th October, 1897.*

September, 1911.

EXTERIOR.

Main Roof.—Rake out and repoint all open and defective joints of brickwork of chimney stacks, parapet, and party walls, and all other brickwork above roof. Renew one broken chimney-pot, reset loose pots, repair all loose and defective filleting and flaunching. Renew all defective tiles, refix loose tiles, making good all defective filleting and pointing. Clean out and examine all lead, zinc or iron gutters, fir up, redress and repair same where defective; make good all defective lead flashing around openings. Re-set loose stone coping in cement mortar. Renew decayed cover to cistern. Rub down, stop, and paint with two coats of good oil colour the whole of the work previously painted. Provide new copper wire balloon grating to top of soil ventilating pipe. Clear away all rubbish, and leave roof sound and watertight in all trades.

Flat over Library and Billiard Room.—Clean, re-dress, repair and renew as necessary all zinc work; soldering up where loose, and leave in good order. Renew broken zinc rainwater pipe taking Conservatory roof. Repair, prepare, and paint large lantern-light two coats of good oil colour. Hack out and reglaze all cracked rolled plate glass to lantern light.

Front of House.—Take down and rebuild in cement the upper courses of brickwork to front where bulged and defective; re-set coping. Rake out and repoint all open and defective joints of brickwork. Repoint in cement round all window and door openings. Repair cement work to reveals. Renew one broken stone window sill. Renew worn threshold to front door. Renew broken stone landing to front entrance steps. Tool down to a level surface the chipped and worn treads to stone steps to area. Renew one broken length of rainwater pipe. Brush down and

twice limewhite walls of area. Reinstate broken yard gulley in area with new. Rub down, stop and paint with two coats of good oil colour the whole of the wood, iron, and other work previously painted, the front door to be varnished in addition and brought to a coach panel surface. Repair and refloat in cement the flooring of balcony.

Rear Front.—Rake out and repoint all open and defective joints of brickwork. Re-point in cement around all window and door openings. Take down and rebuild in cement the defective portion of parapet wall. Repoint all open and defective joints of brickwork to yard walls. Repair cement work to reveals. Rub down, stop, and paint with two coats of good oil colour the whole of the work previously painted. Brush down and twice limewhite walls where now so done. Reinstate with new all cracked and broken lengths of rain-water piping, and paint same three coats oil colour. Renew perforated zinc panels in front of larder window in area. Clean off paving to yard and area, and remove all rubbish.

INTERIOR.

Top Floor (three rooms). — Cut out and repair all cracked and defective portions, and wash, stop, claircolle, and whiten ceilings, repairing defective plastering to wall of right-hand front room. Strip, stop and re-paper walls. Renew broken panel to door of back room. Renew one broken sash-cord. Hack out and reglaze two broken squares of glass and make good all defective putties. Repair broken stone hearth in right-hand front room. Wash down, prepare for and paint two coats of good oil colour all work now painted. The new panel of door to have two extra coats of paint in addition.

Staircase (top floor to basement).—Cut out and repair all cracked and defective portions, wash, stop, claircolle and whiten ceilings and soffites. Strip, stop and re-paper walls with paper marbled, blocked and lined, as before, and varnish same. Renew several defective treads, and replace four missing balusters ; refix newel. Hack out and reglaze several broken squares to window on landing with coloured glass as before. Wash down, prepare for and paint with two coats of good oil colour the whole of the work now painted. Re-polish handrail.

Ground Floor (three rooms) and Hall.—Cut out and repair all cracked and defective portions, wash, stop, claircolle and whiten ceilings and cornices. Strip, stop and re-paper walls, repairing or renewing canvas lining to partition as found necessary. Wash down, prepare for and paint two coats of good oil colour all work now painted. Pickle and clean veined marble mantelpiece in drawing room. Renew broken slip to boxing and reset loose plinth. Repair broken back to stove in dining room.

Basement.—Cut out and repair all cracked and defective portions, wash, stop and whiten ceilings. Wash, stop and twice distemper walls. Repair kitchen range, and provide new fire-brick sides and iron fire-bars to same.

W.C.—Cut out and repair all cracked and defective portions, wash, stop, claircolle and whiten ceiling, and wash, stop and twice distemper walls. Re-polish seat and riser. Cleanse pan. Examine and repair apparatus and leave same in thorough working order.

Generally.—Take off, repair and oil defective locks and other door furniture, replacing all missing keys. Relacquer all brass furniture, finger plates, etc. Renew all defective or missing window fastenings, sash-cords, etc. Clean out all gulleys and traps, and manholes, and well flush the drains. Clean all windows. Examine all bells, pulls, wire-cranks, and fittings, and repair or provide with new bells, pulls, wire, and fittings. Tighten all loose wires, and leave the bells in good working order. Clean out all boilers, cisterns and feed-cisterns. Ease, oil and regulate the ball valves and taps, renewing same if necessary. Sweep all flues. Black all grates and ranges. Scrub floors. Clear and cart away all dirt and rubbish at completion of works. Do all works, whether specially mentioned in this Schedule of Repairs or not, to render the premises "well and substantially repaired, cleansed, etc." (as set out in Repairing Covenant, *ante*), "in accordance with the covenants of the lease, dated 16th October, 1897."

The following Schedule of Repairs was prepared in respect of small houses of a rental value of about 10s. per week :—

SCHEDULE OF REPAIRS found necessary owing to Dilapidations to the premises, No. 2, *Blank's Court, Walworth Road, S.E.* *December, 1911.*

EXTERIOR.

Roof.—Examine roofs, reinstate with new all defective timbers and battening and tiling. Remove all loose filleting and flaunching to chimney-pots and make good; replace all broken, cracked, or missing chimney-pots and tiles. Renew defective portions of iron gutters and down pipes and replace missing length, clean out all gutters and down pipes, make good the joints, and paint same two coats. Take up and reinstate with new, to match existing work, the defective stone and cement paving. Take down all defective brickwork and tile creasing and renew; rake out all defective joints of brickwork and point to match present work; cut out defective bricks and make good. Re-point and repair brick and cement reveals and point round frames; take off stone coping and re-set and joint, making good defects. Examine, cleanse, repair and put in order all drains, gulleys, traps and w.c.; replace missing grating to gulley in yard. Remove old shutters and provide and hang new panelled shutters to match old, paint four coats, and oak-grain and varnish, and paint necessary fastenings. Make good all defective woodwork and doors and window sills, wood-fencing and gate. Hack out all broken or cracked glass and reglaze. Remove all loose and defective putties and renew and paint two coats; rub down, paint two oils, and oak-grain and varnish all work now done, and paint two coats all work now painted. Brush down and lime-white walls where now done.

INTERIOR.

Second Floor Room.—Cut out and make good all loose, bulged, or otherwise defective plastering of ceiling and walls, whiten ceiling and re-paper walls. Clean, touch up, and varnish work now grained, and paint two coats work now painted. Ease and adjust sashes and beads, and put line. Put new stove and paint mantel.

First Floor (Front Room).—Cut out and make good defective plastering, whiten ceiling and re-paper walls. Clean, touch up, and varnish work now grained, and paint two coats work now painted. Ease and adjust sashes and beads and put new line. Take up defective and put new front and back hearths.

Back Room.—Cut out, make good defective plastering, whiten ceiling and re-paper walls. Clean and varnish work now grained, and paint two coats work now painted. Put new stone hearth and provide and set small stove and iron chimney-piece and paint three coats.

Ground Floor (Front Room).—Cut out and make good defective plastering, whiten and re-paper as above. Clean and varnish grained work, and paint two coats all work now painted. Paint two coats and grain and varnish sashes and frame.

Wash-house.—Take up defective paving and renew with 2 in. York; take up and re-lay paving out of level. Repair range, and point round same; ease and re-hang door; put new hinge and new top panel. Renew broken glass; paint two coats work now painted, giving new woodwork four coats. Brush down and twice colour walls. Provide new bib-cock to sink.

Entrance and Staircase.—Cut out defective plastering of ceiling, soffites and walls, and make good and whiten and re-paper. Whiten walls and ceiling of cupboard under stairs. Clean, touch up, and varnish grained work, and paint twice in oil where now done. Repair defective treads and put new nosings. Ease door and repair lock, or renew.

W.C. in Yard.—Cut out and make good defective plastering of ceiling and walls, and whiten ceiling and twice colour walls. Repair door-frame, and provide new ¾-in. ledged door, hung with cross garnets; put Norfolk latch and bolt, and paint four coats; renew defective skirting; overhaul water-waste-preventer and put in proper order; clean w.c. pan.

Generally.—Examine, repair and oil all locks and fastenings, and supply keys where missing. Take off, ease and repair all door and window fastenings where required, and refix or supply new where missing or past repair. Sweep all flues and black all grates and ranges, and scrub all floors and stairs; clear away all rubbish.

CHAPTER XIII.

ESTIMATING COST OF REPAIRS, AND PREPARING CLAIMS.

It is very usual, and certainly desirable from the landlord's point of view, and sometimes from that of the tenant, that the tenant should pay the estimated cost of the required repairs instead of executing them, especially if the claim is made at the end of the lease.

Having prepared the schedule of repairs, the surveyor, if so instructed, proceeds to estimate the cost. This estimate is either for the use of the landlord's solicitor in preparing a claim against the tenant, or for the purpose of checking a claim which the tenant considers exorbitant. It is not, however, uncommon for the question of the amount of damages, as between landlord and tenant, to be left to be determined by a surveyor or by two surveyors (one being appointed on either side), or their arbitrator, if they are unable to agree. It is clearly necessary that the surveyor should know exactly from what point of view his estimate is to be prepared. He may, if acting for the landlord, feel that it is his duty to observe and make the most of every defect; or, on the other hand, if acting for the tenant, he may be inclined to minimise the defects; or, again, as arbitrator, or when he has by mutual consent been appointed as surveyor to act for both the parties, he must approach

the question with an unbiased and judicial mind. Even when acting for the landlord, the surveyor should be careful not to claim anything beyond that to which the landlord is entitled under the covenants of the lease. When one surveyor is appointed to act on behalf of both the landlord and the tenant, his estimate is an appraisement or valuation, and must be written upon stamped paper.

The Stamp Act, 1891,[1] enacts that the stamp duty shall be as follows:—

APPRAISEMENT or VALUATION — of any property, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any building, or of any artificer's work whatsoever:

			£	s.	d.
Where the amount of the appraisement or valuation does not exceed	£5	...	0	0	3
Exceeds £5 and does not exceed	£10	...	0	0	6
,, 10 ,,	20	...	0	1	0
,, 20 ,,	30	...	0	1	6
,, 30 ,,	40	...	0	2	0
,, 40 ,,	50	...	0	2	6
,, 50 ,,	100	...	0	5	0
,, 100 ,,	200	...	0	10	0
,, 200 ,,	500	...	0	15	0
,, 500	...	...	1	0	0

Exemptions.

(1.) Appraisement or valuation made for, and for the information of, one party only, and not being in any manner obligatory as between parties either by agreement or operation of law.

(2.) Appraisement or valuation made in pursuance of the order of any Court of Admiralty, or of any Court of Appeal, from a judgment of any Court of Admiralty.

[1] 54 & 55 Vict. c. 39, First Schedule.

(3.) Appraisement or valuation of property of a deceased person made for the information of an executor or other person required to deliver, in England or Ireland, an affidavit, or to record in any commissary court in Scotland an inventory of the estate of such deceased person.

(4.) Appraisement or valuation of any property made for the purpose of ascertaining the legacy or succession or account duty payable in respect thereof.

By Section 24—

(1.) Every appraiser by whom an appraisement or valuation chargeable with stamp duty is made shall, within 14 days after the making thereof, write out the same in words and figures, showing the full amount thereof, upon duly stamped material, and if he neglects or omits so to do, or in any other manner discloses the amount of the appraisement or valuation, he shall incur a fine of £50.

(2.) Every person who receives from any appraiser, or pays for the making of, any such appraisement or valuation, shall, unless the same be written out and stamped as aforesaid, incur a fine of £20.

It will be noticed that, under the exemption (1), when the estimate is not made as between the parties, but merely for the private information of one party, it does not require to be stamped.

Where, in making a valuation, the surveyor acts as an appraiser, he must either possess an Appraiser's and House Agent's license, for which an annual duty of £2 is imposed, or an Auctioneer's license, for which the annual duty is £10. He cannot recover his charges unless duly licensed either as an appraiser and house agent, or as an auctioneer.

Anyone acting as an Appraiser without a license is liable to a penalty of £50, or, if he acts as a House

Agent, £20. An Auctioneer is liable to a penalty of £100 for carrying on his business without a license.

If the estimate of the surveyor proves to be seriously incorrect, owing to the omission of reasonable precautions in making same, he is not entitled to recover his charges, and, if the charges are paid, he may subsequently be liable in an action for damages, owing to his negligence or lack of skill.

In cases where a landlord and tenant cannot agree upon a surveyor to decide between them, but leave the amount of money to be paid to be determined by their respective surveyors or, if unable to agree, by an arbitrator to be appointed by them, the two surveyors generally nominate their arbitrator in writing, before proceeding with their consideration of the case.

In acting as Arbitrator it is the duty of the surveyor to listen to the arguments on both sides, to go carefully through the schedules with the surveyors engaged by the parties, and ascertain the points upon which they do not differ. Then to note any points of objection or difference, which points should be surveyed personally. In giving a decision it is neither necessary nor desirable for the arbitrator to give his reason for the same. If the question of costs has been left to the discretion of the arbitrator, it is fair for him to consider whether either or both the parties have been reasonable in their demands or offers of settlement. The decision of the arbitrator will be an Award and must be stamped as such, viz. 10s., irrespective of the amount awarded.

In the event of an action at law being necessary, the evidence of the surveyor, if called as a witness by the landlord, will be to show what sum will be required to put the premises into that state of repair in which they should have been left in accordance with the

covenants of the lease. It is a good plan to obtain the estimates of two good local builders as confirmatory evidence, and it is in most cases desirable to have these builders present in Court to prove that the works specified could not be done for less than the amount of the surveyor's own estimate. If the landlord is also claiming for the loss of the use of the premises whilst the repairs are being executed, the surveyor should be prepared to support his estimate of the rental value of the premises, by producing evidence of the actual rentals of similar premises in the same locality.

Estimating Cost of Repairs.

Under the headings of the various trades are given below a few memoranda as to measurements and prices.

The following are *approximate* prices for jobbing work of ordinary quality in London or the suburbs, but naturally prices will vary in different localities according to rates of wages, cost of materials, carriage, etc. :—

Excavator and Concreter.

	£	s.	d.
Excavation in underpinning existing walls in short lengths including all timbering and breaking away any old foundations that may be met with, filling in and ramming, and carting away surplus material, per yard cube	0	7	6
Cement concrete (6 to 1) in underpinning existing walls and in short lengths per yard cube ...	0	17	6
Cement paving 1-inch thick trowelled on surface, per yard super.	0	2	6

Bricklayer.

Brickwork is measured by the rod (272 superficial feet) of "reduced" brickwork, *i.e.*, $13\frac{1}{2}$ inches (or one and a-half bricks) in thickness.

Mem.—To reduce a superficial measurement of brickwork 1 brick (or 9 inches) in thickness, to the "reduced" brickwork standard thickness of 1½ bricks, deduct ⅓ from the measurement, thus, a 1 brick wall 100 feet long and 8 feet 3 inches high—

100·0
×
8·3
———— = 825′·0″ super brickwork 1 brick thick.
825·0
deduct ⅓ 275·0
———
550′·0″ ÷ 272 = 2 rods 6 feet super. reduced brickwork.

	£	s.	d.
The present price (1912) per rod of brickwork (1½ bricks thick) in lime mortar is in London about ... ... or approximately 1s. per foot super.	13	0	0
If built in cement mortar, add per rod super. about	1	15	0
Add if brickwork is in underpinning to walls in short lengths per rod super.	4	0	0
Extra over ordinary brickwork for picked stock, facing and pointing, with a neat struck weathered joint per foot super.	0	0	1½
Ditto for facing with best red bricks, including pointing as last, per foot super.	0	0	5
Raking out joints of old brickwork and pointing with a neat struck joint in cement mortar, including scaffolding, per foot super. ...	0	0	2
Raking out joints of old brickwork, cleaning down the brickwork and colouring to match Malm facing, and pointing with a white tuck joint, including scaffolding, per foot super. ...	0	0	5
Brushing down and limewhiting on walls one coat, per yard super.	0	0	1½
Ditto two coats, per yard super.	0	0	2½

	£	s.	d.
Chimney Pots.			
2 feet high, including flaunching up and setting in cement ... ... (each)	0	4	6
3 feet high, ditto ... ... „	0	6	6
4 feet high, ditto ... ... „	0	7	6
5 feet high, ditto ... . „	0	9	6
Add if pots louvred ... ... „	0	2	6
Drainage.			
4 inch glazed stoneware drain pipes, including laying, jointing, and digging trenches not exceeding 3 feet deep, concrete bed, and benching in concrete, per foot run	0	1	6
6 inch ditto, per foot run	0	1	10
4 inch cast iron drain pipes, including laying and jointing in blue lead, and digging trenches not exceeding 3 feet deep, and including bedding on and encasing with concrete, per foot run	0	3	0
5 inch ditto, per foot run	0	5	0
Extra cost of digging drain trench for the above drains below 3 feet deep, per foot in depth, per foot run	0	0	6
Allowance in addition to be made for bends, junctions, etc., and special pipes.			
Slater and Tiler.			
Slating with new slates, including labour, materials, and nails, per square	2	0	0
Refixing loose slates, 20 inches by 10 inches (each)	0	0	6
Providing and fixing new ditto „	0	0	10
Stripping old plain tiles and any defective battens, and removing, per square of 100 feet super.	0	4	6
New plain tiling laid to a 4-inch gauge, including new battens, per square	2	6	0
Add, if tiling is bedded on hair and ash mortar, per square	0	5	0
Cement filleting or pointing, per foot run ...	0	0	3
Tile hips and ridges (new), bedded in cement, per foot run	0	1	0

Mason.

(*York Stone.*)	£	s.	d.
Landings, 4 inches thick, including bedding in cement mortar, per foot super.	0	3	0
Hearthstones, 2½ inches, ditto	0	1	6
Paving, 2 inches thick, and bedding and jointing in cement, per foot super.	0	1	9
Old paving—taken up, squared and re-laid in cement, per foot super.	0	0	6
Steps and thresholds, average per foot run ...	0	4	0
Window sills, rubbed, sunk, weathered and throated, average per foot run	0	3	0
Copings, 12 inches by 2½ inches, rubbed top and edges and twice throated, per foot run ...	0	1	6
Ditto, 20 inches by 3 inches, per foot run ...	0	3	0
Coping to 9-inch brick wall taken off and reset in cement mortar, per foot run	0	0	6
Ditto, to 18 inches, ditto, per foot run ...	0	0	9

Carpenter and Joiner.

Taking up old flooring, and removing and preparing joists to receive new, per square ...	0	7	6
1 inch yellow deal flooring and laying, per square	1	0	0
Moulded skirtings, 9 inches high, and grounds, and fixing, per foot run	0	0	8
Renewing broken sash-lines (each)	0	1	0

Plasterer.

Note.—It is usual to measure plastering, stucco work, etc., at per yard super; cornices, soffites, margins, etc., of 12-inch girth and over, at per foot super.; smaller cornices, beads, throatings, etc., at per foot run.

Hacking off old plastering and clearing rubbish, per yard super.	0	0	4
Render, float, and set walls, per yard super. ...	0	1	6
For lathing, add per yard super.	0	0	10
Add for raking out joints of brickwork to form key, per yard super.	0	0	3
Hacking off old lath and plaster of ceilings, including removing nails from timber, per yard super.	0	0	6

	£	s.	d.
Trowelled cement stucco, and jointed to imitate masonry, per yard super.	0	2	6

Mem.—The cost of stopping cracks in plaster of walls will vary, and, if they are numerous, the number and extent of them should be noted and priced when on the premises.

Plumber, Etc.

Cast iron gutter and rain-water pipes, per foot run, including fixing:—

	2 in.	3½ in.	4 in.	5 in.
Half-round gutter ...	—	8d.	9d.	11d.
Ogee gutter	—	10d.	11d.	1s. 1d.
Pipes	10d.	1s. 0d.	1s. 2d.	1s. 10d.
Rainwater pipe heads, each	2s. 6d.	3s. 0d.	3s. 6d.	5s. 0d.
Shoes (each)	1s. 3d.	2s. 0d.	2s. 3d.	4s. 0d.
Bends (each)	1s. 6d.	2s. 3d.	2s. 6d.	4s. 6d.

	£	s.	d.
Milled lead, and labour, in flats and gutters, per cwt.	1	2	0
Ditto, in ridges and flashings, per cwt. ...	1	4	6
¾-inch screw-down bib cock and joint, including unsoldering old	0	6	0

Painter and Decorator.

	£	s.	d.
Wash, stop, claircolle and whiten ceilings, per yard super.	0	0	5
Wash, stop, and twice distemper walls, per yard super.	0	0	4
Add for plain cornice or moulding, extra per yard super.	0	0	3
Painting, including rubbing down and preparing old work, one coat, per yard super.	0	0	5
Ditto, two coats, per yard super.	0	0	8
Ditto, three coats, per yard super.	0	0	11
Work executed off ladders add 15 per cent.			
Cleaning old paint, per yard super.	0	0	3
Cleaning and touching up old grained work, per yard super.	0	0	6
Clean and paint two oils on window frames (each side counted) ... ... per side	0	1	6
Clean and paint two oils on sash squares (each side counted) ... ... per dozen	0	1	9

	£	s.	d.
Clean and paint two oils on large squares (each side counted) ... ... per dozen	0	2	6
Burning off old paint preparatory to repainting, per yard super.	0	1	3
French polishing, including cleaning, per foot super.	0	0	6
French polishing, including cleaning, on 3½in. handrail, per ft. run	0	0	4
Common oak graining, per yard super. ...	0	0	10
Varnishing on painted woodwork, one coat, per yard super.	0	0	8
Varnishing on painted woodwork, two coats, per yard super.	0	1	1

Glazier.

Hacking out and reglazing in 21 oz. sheet glass, in squares not exceeding 4 feet super., per foot super.	0	0	7
Re-puttying old glass (measured over all), per foot super.	0	0	2

Paperhanger.

A piece of paper is 21 inches wide and 36 feet in length, and contains 63 superficial feet. The rule for ascertaining the number of pieces of paper required is to find the number of superficial feet of walls, and divide this by 54, which gives the number of pieces required and allows one in seven for waste.

Stripping off old paper, per yard super. ...	0	0	2
Hanging paper, per piece, varying according to the quality and pattern of the paper used, from ... ... 7d. to	0	1	6
Sizing, two coats, and once varnishing, per yard super.	0	0	8
Cleaning, sizing and once varnishing old paper, per yard super.	0	0	9

Venetian Blinds.

Repainting, fitting with new lines, tapes, etc., per foot super.	0	0	5

CHAPTER XIV.

TREES AND TIMBER.

As a general principle, where no express stipulation to the contrary exists, the property in growing timber vests in the owner of the land upon which it grows, while the property in bushes is in the tenant, although he is not entitled to remove them. In the same way windfalls of sound timber would belong to the owner of the land, but windfalls of trees which are not "timber," or of decayed timber trees, would belong to the tenant.

As to what is meant by the term "timber," it may be taken as a general rule to comprise such trees as are used in the building and repairing of houses, viz., oak, ash and elm, under all circumstances; but by custom in different parts of the country, other trees are also included. Trees with a girth of not less than 24 inches are usually considered as timber.

Pollarded trees are not usually regarded as timber, but the point is somewhat doubtful. As a general rule, the trees upon copyhold lands are found to be pollarded, for the reason that on such lands the timber belongs to the lord of the manor, who may or may not have the right to enter and cut it, while pollards are *not* the property of the lord of the manor. This is probably the reason why it is commonly accepted that pollards belong to the tenant. In an ordinary tenancy, if the trunk of the pollarded tree is sound and good, there would appear to be no reason for excepting it from the

general rule as to the ownership of timber. In a case where the landlord, during the term, cut down some oak pollards which were unfit for timber, it was held that, as a tenant for life or years would have been entitled to them if they had blown down, the landlord could not, by wrongful severance, acquire any right to them.[1]

The following is a form of reservation commonly used in leases:—

"Except and always reserved unto the lessor his heirs and assigns all timber and timberlike trees and trees likely to become timber and all other trees whatsoever whether now standing or being or which hereafter during the said term shall be standing or being upon the said demised premises."

An exception of "all the wood," or of "all the underwood, copses, etc.," will be an exception of the soil whereon the wood grows.

If a tenant is only liable for waste (*i.e.*, where there are no express covenants), he may cut timber for the purpose of carrying out necessary repairs, and this will not be an act of waste, provided the repairs were necessitated by the ordinary course of decay, or where the premises were out of repair at the time of the commencement of the tenancy. If, however, a tenant is liable to repair a house, and decay has arisen owing to his neglect or default, and he then fells timber for such repairs, he is said to commit *double waste*.

So also is it waste to cut down or destroy fruit trees growing in a garden or orchard. The rights of a tenant for life to cut timber have been considered in Chapter II. The rights of an incumbent to do so are dealt with in Chapter XVI.

[1] *Channon* v. *Patch*, (1826) 5 B. & C. 897.

When, in a lease, trees are expressly excepted so that they remain in the possession of the landlord, cutting them down will not in law be "waste," as waste can only be committed on property *demised*, although such an act may be a breach of covenant for which the tenant would be liable for damages.

Although it does not properly come within the study of the law of Dilapidations, the liability of the occupier of land upon which poisonous trees or shrubs grow, to adjoining owners, or the tenants of adjoining owners, is of interest. In a case on this point, the plaintiff and defendant occupied adjoining fields. On defendant's land, near the boundary, grew a yew tree the branches of which projected over the ditch, but not beyond. A horse, the property of the plaintiff, having eaten of the yew tree, died. It was held that defendant was *not* liable, for there was no duty on him to prevent the horse having access to the tree.[1]

As to the right of an owner or his tenant to cut the overhanging branches of a tree growing upon the land of an adjoining owner, it is clear that this can be done without giving notice to the owner of the tree. It has been held, by the House of Lords, that the owner of a tree has no right to prevent a person lawfully in possession of land, into or over which the roots or branches of a tree have grown, from cutting away so much of them as project into or over his land, and the owner of the tree is not entitled to notice of the intended cutting, unless it becomes necessary to enter upon his land in order to effect such cutting.[2]

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[1] *Ponting* v. *Noakes*, [1894] 2 Q.B. 281.

[2] *Lemmon* v. *Webb*, [1895] A.C. 1.

CHAPTER XV.

AGRICULTURAL TENANCIES.

As explained in a previous chapter there is an implied obligation on the part of an agricultural tenant to use and cultivate his farm in a husbandlike manner. Under the Agricultural Holdings Act, 1908,[1] s. 26 (1), he may practise any system of cropping of arable land he chooses, and dispose of the produce of the holding, without incurring any liability, provided that he makes adequate provision to protect the holding from injury, and that he returns to the holding the full equivalent manurial value of all crops sold off or removed from the holding in contravention of the custom of the country or of some agreement between himself and his landlord. An action will lie against an outgoing tenant, for breach of covenant to cultivate in a good and husbandlike manner, upon evidence that he has treated the land contrary to the course of good husbandry prevalent in that neighbourhood, if the holding has been thereby injured or deteriorated.

There is no written law as to the custom of the country, and, prior to 1848, there appears to have been no documentary record of the varying customs existing in different parts of the kingdom. In that year, a

[1] 8 Edw. VII., c. 28.

Select Committee of the House of Commons presented an exhaustive report upon the subject. The fullest and most authoritative schedule of such customs appears to have been that prepared in 1875 by a committee appointed by the Central Chamber of Agriculture, and annexed to one of the reports issued by that committee dealing with "Unexhausted Improvements." It is hardly necessary to refer to these customs at length; they appear to be founded on no uniform principle, and they do not even appear to be county customs. In the schedule before mentioned, particulars were given of customs prevailing in fifty-three districts of England and Wales, all of which vary to some extent.

One of the most important questions in connection with agricultural tenancies is as to the right of the tenant to remove fixtures. At common law there is no right on the part of a tenant to remove fixtures erected for merely agricultural purposes, and, in the report by the committee above referred to, it is stated that they "have received no single intimation of the existence of any custom securing to the tenant compensation for buildings, excepting structures not attached to the freehold, which he is, of course, at liberty to remove."

From the case of *Elwes* v. *Maw*,[1] in which the tenancy was agricultural, and the tenant removed fixtures which he had erected at his own expense, without doing damage to the freehold, it clearly appears that the general rule of law was, that whenever a tenant had affixed anything to the demised premises during his term he could never again sever it without the consent of his landlord. The tenant, by

[1] (1803) 2 Sm. L.C.

making it part of the freehold, was considered to abandon all future right to it, so that he would commit an act of waste if he removed it.

This inequitable rule of law was sought to be remedied by the Landlord and Tenant Act, 1851,[1] s. 3, which provides that—

"If any tenant of a farm or lands shall, after the passing of this Act[2] *with the consent in writing of the landlord* for the time being at his own cost and expense, erect any farm-buildings, either detached or otherwise or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything so removed: provided nevertheless, that no tenant shall under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same."

[1] 14 & 15 Vict., c. 25.

[2] 24th July, 1851.

This Act was of little use. It did not go far enough to help the tenant, inasmuch as it only applied to fixtures required for agricultural purposes or for purposes of trade and agriculture, which had been erected by the tenant *with the previous consent in writing* of the landlord, and it was entirely optional on the part of the landlord whether he consented or not.

The Agricultural Holdings Act of 1875 gave to a tenant the right to remove any "engine, machinery or other fixture" put up by the tenant without the consent of the landlord, and for which he was not, under the Act, entitled to compensation, subject, however, to the landlord's right to purchase. The right to remove fixtures under this Act did not include a steam-engine, unless before erecting it the tenant had given the landlord written notice of his intention to do so.

This Act also was practically a dead letter, inasmuch as it could be and was almost universally "contracted out of" by the landlord; that is to say, the landlord could, in the contract of tenancy or otherwise, agree with the tenant that the tenant should not have the benefit of the Act, or should only have the benefit subject to other conditions not included in the Act.

It was repealed by the Agricultural Holdings (England) Act, 1883,[1] but still applies to tenancies created between the 14th February, 1876, and 1st January, 1884.

The Agricultural Holdings Act, 1883, has, together with subsequent Acts, been repealed by the Agricultural Holdings Act, 1908,[2] which deals with any land which is either wholly agricultural or wholly pastoral, or in part

[1] 46 & 47 Vict., c. 61.

[2] 8 Edw. VII., c. 28.

agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord. "Market garden" means a holding cultivated, wholly or mainly, for the purpose of the trade or business of market gardening. By Section 21 of the latter Act it is enacted that—

"(1.) Any engine, machinery, fencing, or other fixture affixed to a holding by a tenant, and any building erected by him thereon for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, shall be the property of and be removable by the tenant before or within a reasonable time after the determination of the tenancy:

"Provided that—

"(i.) Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding:

"(ii.) In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding:

"(iii.) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal:

"(iv.) The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it:

"(v.) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected

to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay to the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by arbitration.

"(2.) The provisions of this section shall apply to a fixture or building acquired since the thirty-first day of December nineteen hundred by a tenant in like manner as they apply to a fixture or building affixed or erected by a tenant, but shall not apply to any fixture or building affixed or erected before the first day of January eighteen hundred and eighty-four."

This section, it may be noted, refers to any engine, machinery, fencing, or other fixture, and to any building for which the tenant is not, under the Act, entitled to compensation. It will be necessary, therefore, to shortly consider for what improvements a tenant may claim compensation under the Act. These are grouped into three classes.

The following are the improvements for which the tenant is entitled to compensation, based on their value to an incoming tenant, and which are included in Part I. of the First Schedule (being improvements to which the landlord's consent is required):—

(1.) Erection, alteration, or enlargement of buildings.
(2.) Formation of silos.[1]
(3.) Laying down of permanent pasture.
(4.) Making and planting of osier beds.
(5.) Making of water meadows or works of irrigation.
(6.) Making of gardens.
(7.) Making or improvement of roads or bridges.

[1] A *silo* is a receptacle in which green fodder in its succulent condition is preserved, instead of first drying it into hay. The process of thus preserving fodder is called *ensilage*, the preserved material being called *silage*.

(8.) Making or improvement of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
(9.) Making or removal of permanent fences.
(10.) Planting of hops.
(11.) Planting of orchards or fruit bushes.
(12.) Protecting young fruit trees.
(13.) Reclaiming of waste land.
(14.) Warping or weiring of land.[1]
(15.) Embankments and sluices against floods.
(16.) Erection of wirework in hop gardens.

[N.B.—*This part is subject as to market gardens to the provisions of the Third Schedule.*]

With regard to the foregoing improvements, Section 2 of the Act provides that compensation shall not be payable in respect of any of them, unless the landlord has, previously to the execution of such improvement, consented in writing to the making of the improvement, and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation or otherwise as may be agreed upon between the landlord and the tenant; and if any such agreement is made between the landlord and the tenant, any compensation payable thereunder shall be substituted for compensation under this Act, but any agreement by which the tenant is deprived of his right to claim compensation is, by Section 5, void.

With regard to any improvement mentioned in Part II. of the First Schedule, viz., No. 17 "Drainage," and of which improvement notice must be given to

[1] By *warping* is meant the covering of land with the sediment deposited from silt-laden streams or floods. The warp makes a rich top-dressing for the land.

the landlord, it is provided by Section 3 of the Act that no compensation shall be payable unless the tenant, not more than three months and not less than two months before beginning to execute such improvement, shall give written notice to the landlord of his intention to make the improvement, and of how he intends doing the proposed work, and upon such notice being given, the landlord and tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed; and in the event of any agreement being arrived at, any compensation payable under such agreement shall be deemed to be substituted for compensation under this Act; or in default of such agreement the landlord may, unless the tenant has previously withdrawn the notice, undertake to execute the improvement himself, and may execute the same in any reasonable and proper manner, and recover from the tenant, as rent, a sum not exceeding 5 per cent. per annum on the outlay, or not exceeding such annual sum, payable for 25 years, as will repay the outlay during that period, with interest at the rate of 3 per cent. per annum. In default of any agreement, or if the landlord fails to carry out the improvement within a reasonable time, the tenant may execute the improvement, and shall be entitled to compensation under the Act.

The following are the improvements included in Part III. of the First Schedule, and which can be executed by the tenant *without* the consent of, and *without* notice to, the landlord, and for which the tenant is entitled to compensation:—

(18.) Chalking of land.

(19.) Clay burning.

(20.) Claying of land or spreading blaes upon land.

(21.) Liming of land.

(22.) Marling of land.[1]

(23.) Application to land of purchased artificial or other purchased manure.

(24.) Consumption on the holding by cattle, sheep, or pigs, or by horses other than those regularly employed on the holding, of corn, cake, or other feeding stuff not produced on the holding.

(25.) Consumption on the holding by cattle, sheep, or pigs, or by horses other than those regularly employed on the holding, of corn proved by satisfactory evidence to have been produced and consumed on the holding.

(26.) Laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy.

(27.) Repairs to buildings, being buildings necessary for the proper cultivation or working of the holding, other than repairs which the tenant is himself under an obligation to execute:

Provided that the tenant, before beginning to execute any such repairs, shall give to the landlord notice in writing of his intention, together with particulars of such repairs, and shall not execute the repairs unless the landlord fails to execute them within a reasonable time after receiving such notice.

With regard to the question of compensation for improvements, Section 1, sub-sections (2) and (3) are important. They are as follows:—

[1] *Marl* is clay containing variable quantities of carbonate of lime, and is put on to land either for the sake of the lime it brings with it, or on sandy soil on account of the clay it contains.

"(2) In the ascertainment of the amount of the compensation payable to the tenant under this section, there shall be taken into account—

"(*a*) any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and

"(*b*) as respects manuring as defined by the Act, the value of the manure required by the contract of tenancy or by custom to be returned to the holding in respect of any crops sold off or removed from the holding within the last two years of the tenancy or other less time for which the tenancy has endured, not exceeding the value of the manure which would have been produced by the consumption on the holding of the crops so sold off or removed.

"(3) Nothing in this section shall prejudice the right of a tenant to claim any compensation to which he may be entitled under custom, agreement, or otherwise, in lieu of any compensation provided by this section.

With regard to **Waste,** Section 6 (3) provides:—

"Where any claim by a tenant of a holding for compensation in respect of any improvement comprised in the First Schedule to this Act is referred to arbitration, and any sum is claimed to be due to the tenant from the landlord in respect of any breach of contract or otherwise in respect of the holding, or to the landlord from the tenant in respect of any waste wrongfully committed or permitted by the tenant, or in respect of breach of contract or otherwise in respect of the holding, the party claiming that sum may, if he thinks fit, by notice in writing given to the other party not later than seven days after the appointment of the arbitrator, require that the arbitration shall extend to the determination of the claim to that sum, and thereupon the provisions of this Act with respect to arbitration shall apply accordingly."

The claim to compensation for improvements is restricted when the tenant is about to quit. By Section 9 (1):—

"A tenant of a holding shall not be entitled to compensation under this Act in respect of any improvements, other than manuring as defined by this Act, begun by him,—

"(*a*) in the case of a tenant from year to year, within one year before he quits the holding, or at any time after he has given or received notice to quit which results in his quitting the holding; and

"(*b*) in any other case, within one year before the expiration of his contract of tenancy:

"Provided that this section shall not apply in the case of any improvement—

"(i.) When the tenant, previously to beginning the improvement, has served notice on his landlord of his intention to begin it, and the landlord has either assented or has failed for a month after the receipt of the notice to object to the making of the improvement; or

"(ii.) In the case of a tenant from year to year, where the tenant has begun the improvement during the last year of his tenancy, and, in pursuance of a notice to quit thereafter given by the landlord, quits his holding at the expiration of that year."

The provisions of the repealed Tenants' Compensation Act, 1890, which are incorporated in the Act of 1908, are shortly as follows:—

By Section 12, when a mortgagee takes possession, a tenant of the mortgagor is entitled to compensation from the mortgagee for improvements, etc., to which the tenant would have been entitled from the mortgagor. Also, if the mortgagee terminates the tenancy and takes possession, he shall pay the tenant compensation for his crops and for any expenditure upon the land which the tenant has made in expectation of remaining in possession

for the full term of his tenancy, but any rent or money due from the tenant in respect of his holding may be deducted from the compensation.

Section 26 gives the tenant the right to practise any system of cropping, and to dispose of his crops in any way he chooses, provided he does not thereby deteriorate or injure the holding, and is as follows:—

"(1.) Notwithstanding any custom of the country, or the provisions of any contract of tenancy or agreement respecting the method of cropping of arable lands, or the disposal of crops, a tenant of a holding shall have full right to practise any system of cropping of the arable land on the holding and to dispose of the produce of the holding without incurring any penalty, forfeiture, or liability :

"Provided that he shall previously have made, or, as soon as may be, shall make, suitable and adequate provision to protect the holding from injury or deterioration, which provision shall in the case of disposal of the produce of the holding consist in the return to the holding of the full equivalent manurial value to the holding of all crops sold off or removed from the holding in contravention of the custom, contract, or agreement:

"This sub-section shall not apply—

"(*a*) in the case of a tenancy from year to year, as respects the year before the tenant quits the holding; or any period after he has given or received notice to quit which results in his quitting the holding; or

"(*b*) in any other case, as respects the year before the expiration of the contract of tenancy.

"(2.) If the tenant exercises his rights under this section in such a manner as to injure or deteriorate the holding, or to be likely to injure or deteriorate the holding, the landlord shall, without prejudice to any other remedy which may be open to him, be entitled to recover damages in respect of such injury or deterioration at any time, and, should the case so require, to obtain an injunction restraining the exercise of the rights under this section in that manner, and the amount of such damages may, in default of agreement, be determined by arbitration.

"(3.) A tenant shall not be entitled to any compensation in respect of improvements comprised in Part III. of the First Schedule to this Act which have been made for the purpose of making such provision to protect the holding from injury or deterioration as is required by this section.

"(4.) In this section the expression "arable land" shall not include land in grass which by the terms of any contract of tenancy is to be retained in the same condition throughout the tenancy."

The Agricultural Holdings Act, 1908, repealed the Market Gardeners' Compensation Act, 1895,[1] and also most of the Tenants' Compensation Act, 1890, and incorporated the provisions of both Acts. It gives market gardeners the right to remove fixtures put up for their trade, making Section 21 applicable to them.

Section 42 of the Agricultural Holdings Act, 1908, entitles market gardeners to compensation for the improvements set out in the Third Schedule to the Act. Notice to, or consent of, the landlord, before executing the improvement, is *not* necessary.

The improvements are as follows:—

(1.) Planting of standard or other fruit trees permanently set out;

(2.) Planting of fruit bushes permanently set out;

(3.) Planting of strawberry plants;

(4.) Planting of asparagus, rhubarb, and other vegetable crops, which continue productive for two or more years;

(5.) Erection or enlargement of buildings for the purposes of the trade or business of a market gardener.

This section also gives a market gardener the right to remove all fruit trees and fruit bushes planted by him

[1] On the construction of various sections of the Act of 1895, *Mears v. Callender* ([1901] 2 Ch. 388) may be consulted.

on the holding, which are *not permanently set out;* but he must remove them *before the end of his tenancy*, otherwise they become the property of the landlord, and the tenant cannot claim compensation for them.

Section 27 provides for the preparation of a record of the condition of the holding, and is as follows:—

"If at the commencement of a tenancy of a holding entered into after the commencement of this Act either party so requires, a record of the condition of the buildings, fences, gates, roads, drains, ditches, and cultivation of the holding shall be made within three months after the commencement of the tenancy by a person to be appointed in default of agreement by the Board, and in default of agreement the cost of making such record shall be borne by the landlord and the tenant in equal proportions."

With reference to the question of the removal of hay, straw, etc., it has been decided that, in the case of a farm lease containing the clause that the tenant "should not, nor would during the last year of the term thereby granted, sell or remove from the said farm and lands, any of the hay, straw and fodder which should arise and grow on the said farm and lands," the prohibition was not restricted to hay, straw and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term.

Covenants as to methods of tillage are almost invariably introduced for the protection of the landlord, and to prevent the overcropping and consequent impoverishment of the land during the term, although now, owing to Section 26 of the Agricultural Holdings Act, 1908, such covenants are of little or no value. The following is an example of a covenant referring to cropping, etc.:—

"To cultivate the farm according to the best system of husbandry and particularly the arable land on the four-course system and not to have white straw crops in any two successive years. To clean the land and keep it clean not to cross-crop the land not to grow for seed tares mustard rape or turnips or any unusual or exhausting crop except for his own use and then not upon the whole to a greater extent than one acre without the written consent of the landlord or his agent. To consume or use upon the premises all hay clover root and green crops straw haulm and chaff and the muck dung and manure into which the same shall be converted and not to clear off the farm or sell the same respectively under a penalty of 20s. for every cartload so drawn off or sold at any time."

It is also usual for an agricultural lease to contain an express covenant that the tenant will not break up permanent pasture or meadow land.

CHAPTER XVI.

ECCLESIASTICAL DILAPIDATIONS.

In a previous chapter it has been pointed out that, as a general principle, the surveyor in his survey of dilapidations should take into account the fact that there is a limit to the age of all buildings, and that, when any building is entirely worn out through age, the cost of rebuilding it will not come within a tenant's covenant "to repair." In the case, however, of ecclesiastical dilapidations, the incumbent has no liability in respect of covenants, since there is no landlord, the freehold of the property belonging to the incumbent so long as he remains in that position. However, upon the principle that "he should endure the burden who derives the advantage," the incumbent, or after his death his personal representatives, is or are liable not only for the repairs of buildings, but also for renewal, as necessity arises, the income derived from the benefice being the only fund available for repairs or rebuilding.

Under the Tithe Act, 1839,[1] s. 15, an incumbent or other person entitled, may, subject to certain restrictions, pull down and sell barns and buildings in which

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[1] 2 & 3 Vict., c. 62.

tithes, when paid in kind, used to be stored, but which barns, etc., have been rendered useless by the commutation of tithes.

An incumbent is at common law bound to maintain the parsonage and also the chancel (unless it is the custom for the parishioners to keep this in repair), and also "keep them in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; and he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-washing and papering belong." [1]

The position of the incumbent is closely akin to that of a tenant for life, except that by the Common Law he is liable for permissive as well as voluntary waste. The incumbent, however, has very limited powers with regard to timber. The trees in the churchyard and on the glebe land belong to him, but he is not to cut them down except for necessary repairs of the chancel and the parsonage; or, if he thinks fit, he may allow the parishioners to do so for the repair of the body of the church. But he will not be justified in cutting down and selling the timber to raise a fund to repair dilapidations in the parsonage arising from his own previous neglect to repair.[2] When trees are topped, the toppings belong to the incumbent, and he may, if it is the custom of the country, cut underwood, but may not grub it up; also, he may perhaps sell timber when

[1] Per Bayley, J., in *Wise* v. *Metcalfe*, (1829) 10 B. & C., at p. 316.

[2] *Sowerby* v. *Fryer*, (1869) L.R. 8 Eq. 417.

it is at a distance from the property to be repaired, and when the proceeds are immediately applied to the purchase of other and more suitable timber for repair of the parsonage or chancel.

In the event of the boughs of trees in the churchyard overhanging a public road, and causing injury to a person driving along such road, the incumbent will be liable.

He may dig or quarry stone for purposes of repair, and he can sell stone when the quarry is far distant from the spot where the stone is wanted, provided similar material is purchased with the proceeds.[1]

The duty of keeping the nave (that is, the middle or body of the church, extending from the chancel or choir to the principal entrance) and the churchyard in good and sufficient repair is upon the churchwardens, as the guardians and keepers of the church and as the representatives of the parish, if they can procure the necessary funds for this purpose. This duty does not, however, extend to the chancel, for, by Common Law, the incumbent is bound to repair the chancel unless there is a custom for the parishioners or the owner of some particular estate to do it. Such custom is usually found (if at all) in cities and towns, but it may also exist in country parishes. The liability extends not only to the fabric of the church, properly so called, but also to whatever is permanently affixed to the freehold, and things necessary in every church, such as the doors, floor, font, pulpit, reading-desk, seats, etc.; also the bells and clock. The churchwardens must also keep the gates, stiles, and doors leading into the churchyard in proper repair, and also the paths.

[1] *Sowerby* v. *Fryer*, *ante*.

The law relating to Ecclesiastical Dilapidations is now codified in **The Ecclesiastical Dilapidations Act, 1871,**[1] which was passed "for the better sustentation of houses of residence, chancels and other buildings," belonging to the church. The Act did not alter in any part the Common Law or custom of the church, or of individuals, with regard to the nature of the claims to be made and maintained for dilapidations, but it provided for the appointment of official surveyors of ecclesiastical dilapidations in every diocese, and for payment of their charges, and laid down a definite course of procedure applicable in all cases where repairs to ecclesiastical property are necessary.

The following are notes of such sections of the Act as are important to surveyors:—

(1.) The Act came into operation on August 1st, 1871.

(2.) It does not extend to Scotland or Ireland.

(3.) The term "benefice" includes all rectories, vicarages, perpetual curacies, chapelries, or districts belonging to any church.

The term "patron" means the person who owns the advowson, and who is entitled to nominate a clergyman to the living when a vacancy occurs, subject to the approval of the bishop.

The "governors" mean the Governors of Queen Anne's Bounty, a fund for the augmentation of the maintenance of poor clergy.

(4.) "Buildings" include all houses of residence, chancels, walls, fences and other buildings and things which the incumbent is by law or custom bound to maintain in repair.

(5.) Includes any building belonging to a benefice, although not in the same diocese.

[1] 34 & 35 Vict., c. 43.

(8.) Surveyors to be appointed in every diocese by the bishop, archdeacons and rural deans, at a meeting held for that purpose. Bishop may remove surveyor for neglect, etc.

(9.) On a vacancy in the office of surveyor another is to be appointed within three months.

(10.) Surveyors to be paid according to a rate of charges fixed by bishop, archdeacons, rural deans and chancellor of the diocese, at a meeting convened for that purpose. But by the **Ecclesiastical Dilapidations Act, 1872,**[1] s. 3, a uniform table of fees and charges, applicable to the whole of England and Wales, may be fixed by the Archbishops of Canterbury and York, and other officials, but it may be amended from time to time.

(11.) The surveyor must not be interested (except as a shareholder in a public company) in any contract or work in connection with the provisions of this Act.

Inspections when Benefice is not vacant.

(12.) Bishop may on complaint of archdeacon, rural dean, patron, or at request of incumbent, order surveyor to inspect buildings.

Copy of complaint to be sent to incumbent or sequestrator (if any) one month before inspection ordered.

A sequestrator is a person (usually one of the churchwardens), appointed by the bishop to receive the income of the living, instead of the incumbent, for the purpose of paying off some debt (*e.g.*, a claim for dilapidations) which the incumbent cannot or will not pay. The benefice is then said to be under sequestration.

A sequestrator is also appointed on the death of an incumbent, until the new incumbent takes office.

[1] 35 & 36 Vict., c. 6.

(13.) If benefice is under sequestration bishop may within six months of such sequestration direct surveyor to inspect, and such inspection shall be renewed every fifth year during the sequestration.

(14.) Surveyor shall, as soon as convenient after such direction, inspect, and within one month after inspection send report to bishop, and copy thereof to incumbent and to sequestrator, if any.

(15.) Where any repairs are needed the surveyor shall report—

1. What works are needed, specifying them in detail.
2. What he estimates to be the probable cost of such works.
3. At or within what time or times such works respectively ought to be executed.

(16.) Incumbent or sequestrator (if any) may within a month state in writing to bishop objections to the report on any grounds of fact or law. If bishop thinks fit he may, at the expense of the person objecting, direct a second report to be made by another surveyor, or take counsel's opinion on any question of law, and bishop shall give his decision in writing.

If no objections made, surveyor's report is final. If objections have been made, then the report, as modified by the bishop's decision, shall be final.

(17.) The incumbent may borrow money for repairs from the governors.

(19.) If benefice not under sequestration, incumbent must execute the repairs within the time named, or within such extended time as bishop shall direct.

(20.) If benefice is under sequestration, the sum fixed as the cost of repairs in the surveyor's report shall be a prior charge upon all money received by sequestrator, except the stipends of the curate or curates appointed to perform the duties attached to the benefice.

(22.) If after complaint as to the condition of buildings the incumbent, within twenty-one days, informs the bishop that he intends forthwith to put them in repair, the bishop shall allow him a reasonable time to execute such repairs, and, if satisfied that they have been done, shall abstain from further proceedings, but the bishop may direct the surveyor to inspect and report upon the repairs, and, if the surveyor finds they are insufficient or other repairs are needed, the powers of this Act may be put in force as if the incumbent had not given notice that he intended doing the repairs himself.

(23.) If incumbent neglects or refuses to execute the repairs specified in the surveyor's report, bishop may raise the money for doing so by sequestration.

Houses of Residence of Archbishops, Bishops, Deans and Canons.

(25.) An archbishop, bishop, or holder of any dignity or office in any cathedral or collegiate church, may employ any surveyor approved by the Ecclesiastical Commissioners, to inspect and examine his house of residence or other building, instead of the diocesan surveyor.

(26.) Such surveyor to report what repairs are needed and within what time the repairs should be executed.

(27.) Such surveyor's certificate that the repairs have been executed shall be conclusive. Certificate to be filed in duplicate in the registry of the diocese, one of the duplicates being sent to the archbishop or bishop by the registrar.

(28.) If the archbishopric, bishopric, etc., become vacant within five years of such certificate, no claim for dilapidations shall be made against such archbishop, bishop, etc., or his representatives, for dilapidations, except for dilapidation due to wilful waste or fire, as provided in Section 47.

As to Vacant Benefices.

(29.) When a benefice becomes vacant (unless the late incumbent is free from all liability for dilapidations, *see* Section 47), the bishop shall within three months direct the surveyor to inspect the buildings and report what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable. The late incumbent or his executors, with his or their surveyor, shall have a right of entry at reasonable times upon the premises of the vacated benefice until such time as the question of the dilapidations has been finally settled.

(30.) Diocesan surveyor to send copy of report to the new incumbent (when appointed), and a copy to the late incumbent or to his executors. The surveyor shall certify to the bishop when and to whom and in what manner each copy was sent.

(31.) Report to state in detail what repairs are needed. and may state any special circumstances, and shall state what sum in the opinion of the surveyor will be required to make good the dilapidations.

(32.) The new incumbent, and the late incumbent or his executors, may state in writing to the bishop objections to the report on any grounds of fact or law, and in such case bishop may order a second report, as under Section 16.

(33.) Objections to be sent within one month after the report has been sent to the objector, but bishop may receive objections after the month has expired, if he thinks fit.

(34.) In uncontested cases, or after he has considered the whole matter, bishop shall make an order stating the repairs and their cost, for which the late incumbent or his executors or administrators is or are liable.

(35.) This order to be signed by bishop in triplicate. One copy to be sent to the new incumbent, one to the late incumbent or his executors, and one to the registrar, who is to send a copy to the governors.

(36.) The sum stated in the order as the cost of repairs shall be a debt due from the late incumbent or his executors to the new incumbent, and shall be recoverable by action. It shall be neither postponed after other debts, nor preferred before them.

(37.) The new incumbent shall, as and when he receives payment of this sum, pay it over to the governors.

(38.) The governors may advance the new incumbent, on the security of the benefice, the whole or any part of this sum.

(42.) The new incumbent shall cause the repairs specified in the order to be executed within eighteen months of the date of the order, unless he decides, with the consent of bishop and patron, to rebuild.

Execution of Works.

(44.) Upon execution of works specified, the governors are to pay the builder on receipt of surveyor's certificate countersigned by the bishop. If such moneys in the governors' possession are exhausted and further moneys are required for the completion of the repairs, the same shall be paid by the incumbent.

(45.) If benefice is under sequestration, or if incumbent refuses or neglects to do the repairs, the repairs shall be executed under the direction of the surveyor in accordance with a specification and contract prepared by him. The liability of the governors, bishop, and patron is limited to the moneys which they have in hand.

(46.) On completion of repairs to his satisfaction, surveyor to give certificate in triplicate, one to the incumbent or sequestrator, one to the registrar, and one to the governors.

(47.) No further report shall be made for five years, and if the benefice becomes vacant during such five years the incumbent or his representatives shall not be liable to any claim for dilapidations in respect of the buildings specified in the certificate, except for wilful waste, and damage by fire, should the incumbent have failed to insure in accordance with Section 54.

(48.) The surveyor's charges, and also the fees of the bishop's secretary and registrar, are to be paid by the incumbent or by the sequestrator.

(50.) If the incumbent wishes to alter, remodel or rebuild buildings instead of repairing them, he may do so with the consent of the bishop and patron. In such a case, the surveyor shall, on the completion of the works to his satisfaction, give a special certificate of completion in triplicate, one being sent to the incumbent, one to the bishop (who shall cause the same to be registered in the registry of the diocese), and one to the governors.

(52.) If an incumbent, after having paid to the governors the cost of repairs as specified in the report, desire to postpone executing the repairs for a limited time, the bishop, with the patron's consent, may authorise such postponement on payment of a sum to meet probable future dilapidations.

(53.) No sum shall be recoverable for dilapidations in respect of any benefice becoming vacant, unless the claim for such sum be founded on the bishop's order made under the provisions of the Act.

As to Insurance.

(54.) Incumbent to keep parsonage and all buildings, and also the chancel if he is liable to repair the chancel, insured against fire, in an office approved by the governors, for at least three-fifths of the value of the buildings.

(55.) The policy to be in the joint names of the incumbent and the governors, and the receipt of the premiums to be shown each year.

(56.) If an insured building is burnt down and the insurance company elect to pay the sum insured instead of reinstating the buildings, the sum shall be paid to the governors.

(57.) If a building is not insured or is under-insured and is burnt down, the surveyor shall certify (in triplicate) to the bishop what sum is necessary to reinstate the buildings, and the incumbent shall pay that sum to the governors. If he fails to do so, the bishop may raise the amount by sequestration. If the benefice is under sequestration, the sum necessary to reinstate the buildings shall be a charge on the income as described in Section 20.

Miscellaneous.

(58.) The provisions of this Act do not apply to a building belonging to the benefice, which has been let on lease, unless the tenant has not in such lease been made liable to insure, rebuild, or repair such buildings, but the surveyor may inspect such buildings.

(66.) If the surveyor dies or is removed after making an inspection but before granting his final certificate of completion of repairs, the previous acts of such surveyor, including his report (if any), shall be adopted by the surveyor appointed to act in his place, and who shall proceed with such inspection, report, etc., as if the inspection had been originally made by him.

(67.) Surveyor and persons authorised by him may enter and inspect buildings and execute works at any reasonable time.

(70.) An existing incumbent who, *prior to the passing of the Act*, shall have pulled down buildings (without due authority), and shall have substituted other buildings of equal or greater value, shall (if the bishop consents) not be liable for dilapidations in respect of the buildings so pulled down, provided the substituted buildings have been insured.

(71.) On the application of the incumbent, and if in the opinion of the bishop any building belonging to or forming part of any house of residence is unnecessary, the bishop, with the consent of the patron, may, in writing, authorise the removal of such building, and the proceeds of such removal (if any) shall be applied to the improvement of the benefice as the bishop and patron shall agree.

The Ecclesiastical Surveyors' Association has caused to be compiled a draft model report and specification. Some of the points laid down for the guidance of diocesan surveyors are of considerable interest. Thus, where work has been previously grained and varnished, plain paint only can be claimed. In the case of dampness nothing can be claimed beyond the renewal of the part which may have decayed. It is not usual to assess dilapidations on roads, or to charge incumbents for sweeping chimneys; nor is it customary to charge dilapidations upon a temporary building or upon a barn or stable erected upon the glebe land by, and claimed by, a tenant.

CHAPTER XVII.

FENCES, PARTY WALLS, DANGEROUS STRUCTURES, ETC.

As to the ownership of fences, in the case of adjacent enclosures, separated by a hedge and ditch, it may be taken, in the absence of direct evidence to the contrary, that the ditch belongs to the owner of the field in which the hedge is. The rule as to ditching is that no man making a ditch can cut into his neighbour's land, but he usually cuts to the extremity of his own land. He is, of course, bound to throw the soil which he digs out upon his own land, and often, if he likes, plants a hedge upon the top of it; therefore, if he cuts afterwards beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land and is a trespasser.

In a case[1] where the plaintiff and defendant were adjoining owners of land, the lands being bounded by a bank with a fence and with a ditch on the defendant's side, the defendant had, for nearly fifty years, trimmed the fence, pollarded the trees, and cleared the ditch, but there was no evidence of knowledge of this on the part of the plaintiff. It was held that these acts of ownership did not rebut the presumption that the bank and fence were the property of the plaintiff.

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[1] *Henniker* v. *Howard*, (1904) 90 L.T. 157.

An action for not repairing fences, whereby another person is injured, can, in ordinary cases, only be maintained against the occupier[1]; and if a tenant fails to repair fences, the landlord can sue him for damage done to his reversion, even if there is no express covenant to repair them.[2] If, however, the landlord has undertaken to keep the premises in repair, he will be liable to repair the fences.

A tenant is bound to preserve the boundaries of the land demised to him.

If two persons possessing adjoining fields are neither of them under any obligation to fence, each must take care that his cattle do not enter upon the land of the other.

In the absence of evidence to the contrary, a fence made of oak or other wood pales belongs to the owner on whose side are the horizontal rails to which the pales are nailed. In other words, the owner in erecting the fence drives in the nails so that the points are towards his land.

Railway companies are, under the provisions of the Railway Clauses Act, 1845,[3] bound to make and maintain fences between their railway and adjoining lands, for protecting such adjoining lands from trespass and for preventing the cattle of adjoining owners from trespassing on the railway.

Under the Public Health Acts Amendment Act, 1907,[4] s. 31, if any land (other than a common) adjoining a street is unfenced, or if the fences are out of

[1] *Cheetham* v. *Hampson*, (1791) 4 T.R. 318.

[2] *Ibid.*

[3] 8 Vict., c. 20, s. 68.

[4] 7 Edw. VII., c. 53.

repair, and such land, owing to the non-repair of the fence, is a source of danger to passengers, or is used for any immoral or indecent purposes, or for any purpose causing annoyance or inconvenience to the public, the Local Authority may, with the consent of the Local Government Board, serve a notice on the owner or occupier requiring the land to be fenced or the fence repaired; and if this is not done within fourteen days, the Local Authority may do the necessary work, and can recover the cost from the owner or occupier.

Party Walls: Outside the London Area.

When a wall divides two properties, the presumption is that the middle of the wall is the line of the boundary between them, but it depends on the circumstances under which the wall was built. For instance, when a party wall is built by two owners, half of the wall being on one owner's land and the other half on the other's, each owner owns half the wall; but when the circumstances under which the wall was built are not known, the presumption is that the party wall belongs to the two owners as tenants in common.

The expression "party wall" may be used in four different senses: (1) A wall of which the two adjoining owners are tenants in common—(this is the most common and the primary meaning of the term). (2) A wall the ownership of which is divided longitudinally into two strips, one belonging to each of the adjoining owners. (3) A wall which belongs entirely to one of the adjoining owners, but is subject to an easement in the other to have it maintained as a dividing wall between the two tenements. (4) A wall divided longitudinally into two moieties, each moiety being subject to a cross

easement in favour of the owner of the other moiety.[1] When an easement of support exists, neither owner can pull down a party wall without being liable for interfering with the rights of the other.

The law as to the liability to repair a party wall, when the owners own it as tenants in common, does not seem very definite, but in an American case, *Campbell* v. *Mesier*,[2] quoted in *Leigh* v. *Dickeson*,[3] where an owner had pulled down his house, and also the party wall which had become ruinous, and had rebuilt the party wall, it was held that the adjoining owner was bound to contribute rateably to the expense of the new wall, it being absolutely necessary to have the wall rebuilt. An adjoining owner is not, however, bound to contribute towards building the new wall higher than the old, nor, if materials more costly or of a different nature are used, is he bound to pay any part of the extra expense.

Party Walls: Inside the London Area.

It is necessary to consider some of the provisions of the London Building Act, 1894,[4] in connection with this subject.

Under Part VIII. of that Act provision is made with respect to party structures to which the owner of one house wishes to make some improvement, or to repair. Such a man is termed under the Act the "building owner"; the owner of the adioining house is called the

[1] *Watson* v. *Gray*, (1880) 14 Ch.D. 192, per Fry, J.

[2] (1820) 4 John. (Amer. Ch.) 333.

[3] (1883) L.R. 12 Q.B.D. 194.

[4] 57 & 58 Vict., c. 213.

"adjoining owner." A building owner has, by virtue of Section 88, shortly, the following rights in regard to a party structure:—

(1.) To make good, underpin or repair any party structure defective or out of repair.

(2.) To pull down and rebuild any such structure which is so far defective or out of repair as to make it necessary to pull it down.

(3.) To pull down timber and other partitions which divide any buildings, and which are not conformable with the regulations in the Act, and to build instead a party wall conformable thereto. To pull down buildings with rooms or storeys, the property of different owners, intermixed, also buildings built over public ways, or over passages belonging to other persons, and to rebuild the same in conformity with the Act.

(4.) To raise and underpin party structures, if permitted by the Act, or any external wall built against any such party structure, provided he makes good any damage occasioned thereby to the adjoining owner, and carries up the flues and chimney stacks belonging to the adjoining owner to a proper height.

Generally, the building owner may pull down any party structure not strong enough to carry any building intended to be erected. He may cut into a party structure. He may cut away projections from any party wall. He may, in order to erect an upright wall against it, take down or cut away any part of a wall which overhangs his ground.

All these rights may be exercised, provided the building owner makes good any damage occasioned to the adjoining premises by reason of such work. He may also carry out any works necessary to connect the party structure with the adjoining premises.

Procedure.

Whenever the building owner proposes to exercise any of the rights conferred upon him with respect to party structures, the adjoining owner may, by notice in writing, require him to build on the party structure such chimney jambs, breasts or flues, or piers, recesses or like conveniences as may fairly be required for the convenience of such adjoining owner, unless compliance with such request will cause the building owner unnecessary inconvenience, injury or delay; and if the adjoining owner contests the point, this, like other differences, must be settled by arbitration.

Before a building owner commences any work on a party structure, unless the adjoining owner and occupiers consent in writing to the work being proceeded with, or the building is dangerous, he must give at least two months' notice to the adjoining owner, and this notice must be either personal or must be sent in a registered letter to the owner at his last known place of abode, or delivered to some person on the premises, or if no person be found on the premises, a copy of the notice may be fixed thereto in a conspicuous position. The notice must be either printed or in writing; it must state the nature of the proposed works, and the time when it is proposed to commence such works.

Unless, of course, the party structure had been condemned by the district surveyor, the onus of proving it to be dangerous would, doubtless, rest on the building owner.

The adjoining owner, on receiving such notice, may require the building owner to build, or may himself build, on such party structure, any of the works

previously described. He must send to the building owner, within one month from the receipt of the "party-wall notice," a notice in which he must specify the work he requires to be done, and also give any necessary plans. If either owner does not, within fourteen days from the service on him of any notice, express his consent thereto, a difference shall be deemed to have arisen between the building owner and the adjoining owner. In the case of a difference arising, both parties may agree upon a surveyor to determine it, or each party may appoint a surveyor, and the two surveyors shall appoint a third surveyor. These three surveyors, or any two of them, may determine the difference. They may by their award determine the right to do the work, the time and manner of doing it, and any other matter that arises out of the subject in difference, but, unless otherwise agreed, the time fixed for beginning the works shall not be until after the expiration of the before-mentioned notice. In practice, however, it is usual to agree to commence the works at once. The award may be appealed against to the County Court at any time within fourteen days from the date of the delivery thereof.

If either party fails to appoint a surveyor within ten days of the notice requiring him to do so, the party giving the notice may make the appointment.

The costs of preparing the award shall be paid by such party as the surveyors shall determine.

Section 95 deals with the expenses of work to party structures. Shortly, its provisions are as follows:—

(1.) All expenses of repairing or rebuilding defective party structures are to be borne by building and adjoining owners in proportion to the use that each owner makes or may

make of such structure. Thus, the adjoining owner will have to bear the cost of any extra works which he requires the building owner to execute for the adjoining owner's convenience.

(2.) The same principle applies to pulling down any timber or other partition dividing a building, and building a party wall in its stead.

(3.) The building owner must bear the whole cost of raising a party structure or any external wall built against another external wall for his own convenience, and the cost of carrying up the flues and chimneys of the adjoining owner to the requisite height on or against such party structure or external wall. He must also bear the whole cost of pulling down and rebuilding for his own convenience any party structures which are sound and of proper material. He must bear the cost of cutting into and repairing any party structure so cut into. He must also bear the cost of cutting away and making good any footing, chimney breast, jambs or floors cut away, and he must pay the adjoining owner compensation for disturbance and inconvenience caused by the works.

By Section 92, a building owner and his workmen may, after giving the owner and occupier fourteen days' notice (or, in a case of emergency, reasonable notice), enter any premises for the purpose of executing any work which he is entitled to execute, and may remove furniture, etc. If the premises are closed he may, if accompanied by a policeman, break open any fences or doors for this purpose.

The building owner shall, within one month after the completion of any works the expenses of which are partly to be borne by the adjoining owner, or of any works executed at the request of the adjoining owner, deliver to such owner an account in writing of the particulars and expenses of such work, after allowing credit for old materials. The adjoining owner may

state his objections to such account within a month after receiving it, and any dispute shall be settled by arbitration. If he does not object within a month, he shall be deemed to have accepted the same as correct, and the amount may be recovered from him by the building owner as a debt.

In the event of a building owner failing to execute required works, or make good damage he has caused to the adjoining owner's or occupier's property, he shall incur a penalty not exceeding £20, and be liable to a daily penalty not exceeding the like amount, such penalty being recoverable before a magistrate. (Section 200 (5).)

Dangerous Structures: Outside the London Area.

Under Section 160 of the Public Health Act, 1875,[1] the provisions of the Towns Improvement Clauses Act, 1847,[2] Sections 75-78 are incorporated, which are, shortly, as follows:—If any building or wall is ruinous or dangerous, the surveyor shall cause a proper hoarding to be put up to protect passengers, and shall give notice to the owner and to the occupier to take down, secure, or repair such building or wall. If the repairs, etc., are not done, complaint may be made to two Justices, who may order the owner, and failing him the occupier, to do the necessary work within a specified time, or, in default, the Local Authority may do the work, and can recover the cost from the owner, by distress if necessary. If the owner cannot be found, the Local Authority may, after due notice, take such building or land, making compensation to the owner as

[1] 38 & 39 Vict., c. 55.

[2] 10 & 11 Vict., c. 34.

provided by the Lands Clauses Act, 1845,[1] in the case of land taken otherwise than with the consent of the owner. If such house is pulled down they may sell the materials, paying the owner the overplus arising from the sale, after deducting the expenses incurred.

Dangerous Structures: Within the London Area.

Part IX. of the London Building Act, 1894, as amended (with regard to the service of notices) by Section 5 of the London Building Act, 1894 (Amendment) Act, 1898,[2] relates to dangerous and neglected structures. It enacts that whenever it becomes known to the London County Council that any structure is in a dangerous state, they shall require such structure to be surveyed by the district surveyor, or some other competent surveyor, who shall thereupon make a report to them.

If the building is certified to be in a dangerous state, the Council may thereupon cause the same to be shored up, or otherwise secured, and a fence put round it, and shall serve a notice on the owner or occupier, or some person on the premises, or fix a copy of such notice on the premises, requiring him to forthwith take down, secure, or repair the structure, as may be necessary.

If the owner or occupier to whom notice is given pays no attention to the notice, the Council must make complaint before a magistrate, who may order the owner to take down or repair the building, etc., within a specified time, and if at the expiration of such time the order has not been complied with, the Council may do the required work and charge the owner with

[1] 8 Vict., c. 18.

[2] 61 & 62 Vict., c. 137.

the cost, including the cost of obtaining the order, without prejudice to the owner's right to recover the same from the tenant or any other person who is under obligation to repair.

If the owner cannot be found, or on the owner's default or refusal to pay such expenses, the Council, after serving him with three months' notice of their intention to do so, may sell such structure to pay the expenses, paying the surplus (if any), after deducting the expenses incurred, to the owner on demand. If the proceeds of the sale are insufficient, the Council may recover the balance from the owner by proceedings before a magistrate, under the Summary Jurisdiction Acts.

The expression "owner," under the London Building Act, 1894, Section 5 (29), applies to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of any land or tenement, *otherwise than as a tenant from year to year, or any less term, or as a tenant at will.* Therefore, any tenant under a three years' agreement or a lease for a term of years will be liable as "owner," as also will be a tenant in possession of *part* of a house under an agreement or lease for a greater interest than from year to year, or a tenant of a house for a term of years who has under-let parts of it for smaller terms of years.

In order to facilitate the recovery of expenses under the Act, by Section 173 "the owner immediately entitled in possession, *or the occupier*," shall in the first instance pay the expenses, with this limitation, that an occupier shall not be liable to pay any sum exceeding

in amount the rent due, or which will afterwards become due, from him in respect of the premises. Also any occupier who has paid such expenses may deduct the amount so paid from any rent payable by him to any owner of the same premises, and any owner who has paid more than his due proportion of any such expenses may deduct the amount so overpaid from any rent payable by him to any other owner of the same premises, or he can recover the amount by action.

It should be noted, however, that the word "occupier" only applies to tenants holding from year to year or for shorter periods, since a tenant for a longer period comes within the definition of "owner."

Any owner or other person authorised by him may, under Section 192, enter any premises for the purpose of complying with any notice or order served or made on him under this Act, after giving seven days' notice to the occupier, and on producing the notice or order.

CHAPTER XVIII.

LIABILITY FOR EXPENSES UNDER THE PUBLIC HEALTH ACTS, HOUSING ACTS, ETC.

THE liability to pay expenses incurred in sanitary works, paving, abating nuisances, etc., under the **Public Health Act, 1875,**[1] is on the "owner" of the premises. The owner means "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

"Rack-rent," in this Act, "means rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises; and the full net annual value shall be taken to be the rent at which the property might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes, and tithe commutation rentcharge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain the same in a state to command such rent." Under the **Public Health (London) Act, 1891,**[2] these words are similarly defined.

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[1] 38 & 39 Vict., c. 55, s. 4.

[2] 54 & 55 Vict., c. 76.

The term "owner" does not necessarily mean the lessor. For instance, in a case where premises were let to a tenant at a rent which was *not* a rack-rent, and the tenant had sub-let them for the whole term, less a few days, the rent reserved and the covenants and conditions being the same in the under-lease as in the original lease, the under-tenant, and not the tenant, was held to be the "owner" under the Public Health (London) Act, 1891.[1]

In another case[2] the question at issue was as to who is "owner" of premises within the Metropolis Management Act, 1855,[3] so as to be liable for a proportion of the expense of paving, etc., executed by the District Board; and, in particular, whether a tenant who has sub-let can be so liable, if he himself derives no profit or benefit from so doing. Under the above Act the word "owner" means the person for the time being receiving the rack-rent, either on his own account or as agent for any other person. In 1886 one Harper let the premises to Walford for a term of years, at the rent of £31 per annum. Walford occupied, and then in 1889 sub-let to one Wright at the same rent of £31, and Wright took possession and paid rent to Walford, who continued to pay it to Harper. There was a negotiation for a direct lease from Harper to Wright, but such lease had not been actually executed, though it was contended by Walford that in fact Wright was recognised as Harper's tenant, and that he (Walford) received the rent from Wright for Harper. He stated in his

[1] *Truman, Hanbury, Buxton and Co.* v. *Kerslake*, [1894] 2 Q.B. 774.

[2] *Walford* v. *Hackney Board of Works*, (1894) 11 T.L.R. 17.

[3] 18 & 19 Vict., c. 120.

evidence: "I pay the rent to Harper, receiving it from Wright practically as Harper's agent. I negotiated with Harper to accept Wright as his tenant, and he did so. I put Wright into possession, and I received the rent last Michaelmas, and paid it over to Harper. I do not receive a shilling profit. Wright is Harper's tenant." The Board had paved the street, and demanded £110 from Walford as an apportioned amount due from him in respect of his premises, and, on an application to the magistrate, an order was made for payment, against which Walford appealed.

The Court decided in favour of Walford; that he was not liable as "owner" of the premises, since he paid the whole of the rent over to another person who was really the owner, and consequently Walford was not the person in receipt of the rack-rent within the meaning of the Act.

THE LIABILITY OF THE TENANT BY CONTRACT.

Whether the liability to pay for sanitary works, paving, etc., can be shifted by the landlord on to his tenant depends on the wording of the covenants of the lease. The various decisions given upon such covenants are conflicting; but as a general rule it can safely be said that if the tenant, in his lease, agrees to pay "charges," "duties," "impositions," or "outgoings," he will be liable to pay all such expenses, unless the works are of such a character that it could not have been within the reasonable contemplation of the parties that the tenant should pay them. For example, in the case of a house let on a yearly tenancy at £20 a year in London, the tenant having agreed to pay "outgoings," it was held that he was not liable to pay expenses

incurred by the landlord in reconstructing drains or paving a yard to abate a nuisance, by order of the Local Authority under the Public Health (London) Act, 1891, as, in view of the shortness of the tenancy, it could not have been in the contemplation of the parties that the tenant should bear such expenses. But the tenant, in the same case, was held liable for the cost of providing a supply of water to a water-closet in accordance with that Act, as even in the case of property of small value, and let from year to year, it might reasonably be in the contemplation of the parties that the tenant should bear such an expense.[1]

In a similar case the tenant had, in a three years' agreement, agreed to pay "all rates taxes assessments and outgoings whatsoever in respect of the said premises." After the expiration of the term the tenant remained in possession as a yearly tenant, paying the same rent, viz. £70, and during this period the sanitary inspector served upon the owners an intimation, under Section 3 of the Public Health (London) Act, 1891, that the house was in such a state as to be a nuisance, owing to a drain being defective. The owners gave notice to the tenant requiring him to do the necessary work, and, upon his refusing to do so, did the work themselves, without waiting to be served by the Sanitary Authority with a notice under Section 4 of the said Act *requiring* them to do the work, and sued the tenant, under his covenant to pay all "outgoings," for the cost, amounting to £70 1s. 6*d*. The Court held that the action was not maintainable, for two reasons:—

[1] *Valpy* v. *St. Leonards Wharf Co.*, (1903) 67 J.P. 403.

1. That the owners, having done the work immediately upon receipt of the intimation of the existence of the nuisance and before service of any notice requiring them to abate it, did it voluntarily and not under any obligation, and that the expenditure was not an "outgoing" within the meaning of the covenant; and

2. That even if a covenant to pay "outgoings" would cover such an expenditure, it was not, having regard to the proportion which the expenditure bore to the yearly rent, a covenant which was applicable to a yearly tenancy, and that the tenant, in holding over after the expiry of his term and paying rent, could not be presumed to have intended to become a yearly tenant on the terms of such an obligation.[1]

In a case where a tenant for years, although there was no repairing covenant, had covenanted in his lease to pay "all impositions charged or imposed upon or in respect of the said premises on the landlord tenant or occupier of the same," and notice was given to the landlord by the Sanitary Authority under the Public Health (London) Act, 1891, to abate a nuisance caused by a privy, and to construct a water-closet in accordance with the by-laws of the London County Council, it was held that the tenant was liable, under his covenant, to repay the landlord the cost of carrying out the work, such expenses being covered by the word "impositions."[2]

In another case, where a house was let at the "clear yearly rent" of £54, under a three years' agreement, and the tenant had agreed to pay "all rates taxes assessments

[1] *Harris* v. *Hickman*, [1904] 1 K.B. 13.

[2] *Foulger* v. *Arding*, [1902] 1 K.B. 700.

and impositions whatsoever whether parliamentary parochial or otherwise," it was held that the expense of complying with a notice from the Sanitary Authority to reconstruct drains constituted an "imposition" within the agreement, notwithstanding the shortness of the tenancy,[1] for which the tenant was liable under his contract.

So also, where a tenant had taken a house for three years at the yearly rent of £55, agreeing to pay all "outgoings in respect of the premises," and during the tenancy the landlord, in obedience to an order of the Sanitary Authority, reconstructed the drainage system of the house at a cost of £83 10s., it was held that the tenant was liable, under his agreement, to repay the landlord the amount so expended.[2]

In a case under the **Factory and Workshop Act, 1901,**[3] where structural alterations to an underground bakehouse were required by the District Council under Section 101 of that Act, it was held that the tenant was liable for the whole of the expenditure, under his covenant to pay all "impositions and outgoings."[4]

A tenant has been held liable for remedying a defective drain by order of the Local Authority under Section 94 of the Public Health Act, 1875, when, in addition to a covenant to repair, he had agreed to pay "sewers rate and all other taxes rates *charges* and assessments whatsoever . . . payable by either the owner or occupier."[5]

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[1] *Warriner, In re; Brayshaw* v. *Ninnis*, [1903] 2 Ch. 367.

[2] *Stockdale* v. *Ascherberg*, [1904] 1 K.B. 447. And see *Bettingham, In re; Melhado* v. *Woodcock*, (1892) 9 T.L.R. 48.

[3] 1 Edw. VII., c. 22.

[4] *Goldstein* v. *Hollingsworth*, [1904] 2 K.B. 578.

[5] *George* v. *Coates*, (1903) 88 L.T. 48.

With reference to **street paving works** executed by the Local Authority under Section 150 of the Public Health Act, 1875, it has been held that a tenant, who has in a twenty-one years' lease covenanted to pay "all rates taxes and outgoings now payable or hereafter to become payable in respect of the said premises," is liable to repay his landlord who had paid to the Local Authority his proportion of the expenses incurred, as such expenses are "outgoings payable in respect of the premises."[1] A similar decision was given in an earlier case, where the tenant had in a twenty-one years' lease covenanted to pay "all taxes charges rates duties tithes and tithe rent-charge assessments and impositions whatever."[2]

But such expenses cannot be recovered by the landlord from his tenant when the latter has only covenanted to pay "all rates taxes and assessments whatsoever which now are or during the term shall be imposed or assessed upon the premises or the landlords or tenants in respect thereof by authority of Parliament or otherwise except the landlord's property tax."

Such a payment is not a rate, tax, or assessment within the meaning of the covenant, and such covenants as this are confined to rates and assessments of a temporary and necessary nature, and do not include a sum which is a charge on property giving it an increased permanent value.[3]

Where there is no covenant by the tenant to bear such expenses, the owner will be liable to repay the

[1] *Greaves* v. *Whitmarsh, Watson and Co.*, [1906] 2 K.B. 340.
[2] *Wix* v. *Rutson*, [1899] 1 Q.B. 474.
[3] *Baylis* v. *Jiggens*, [1898] 2 Q.B. 315.

tenant the cost of abating a nuisance. For instance, the Sanitary Authority, acting under Section 4, sub-section 1, of the Public Health (London) Act, 1891, served a notice at the premises, directed to the owner or occupier, and requiring a nuisance, which arose by reason of water and sewage collecting in the cellar owing to a stoppage in the drains, to be abated. They did not serve on the owner a notice under Section 4, sub-section 3, which provides for the service on the owner of a notice to abate, in cases where the nuisance arises from any want or defect of a structural character. The tenant, who held on a yearly tenancy, was liable, under Section 4, sub-section 4, to a penalty of £10 if he made default in complying with the requisitions of the notice, and therefore did the necessary work, in the course of which it was discovered that the nuisance arose from a structural defect in the drains. He sued the landlord and was successful, the Court holding that he was entitled, under Section 11, sub-section 1, of the Act, to recover from the landlord the costs and expenses incurred in abating the nuisance, as money paid by him "for the use and at the request of" the landlord, although no notice under Section 4, sub-section 3, had been served upon the landlord as owner of the premises. In the opinion of Mr. Justice Charles, the tenant was entitled to recover from the landlord at common law, apart from Section 11, on the principle applicable to cases where one man has been legally compelled to expend money on what another man ought to have done, as in this case the tenant had been legally compelled to incur expense in abating a nuisance which the landlord ought to have abated.[1]

[1] *Gebhardt* v. *Saunders*, [1892] 2 Q.B. 452.

Section 42 of the Public Health (London) Act, 1891, provides that "If a water-closet or drain is so constructed or repaired as to be a nuisance or injurious or dangerous to health, the person who undertook or executed such construction or repair shall, unless he shows that such construction or repair was not due to any wilful act, neglect or default, be liable to a fine not exceeding twenty pounds," and there is a further proviso that when a person is charged with an offence under this section he shall be entitled to have brought before the Court any other person, being his agent, servant or workman, whom he charges as the actual offender; and if he can prove that this other person committed the offence, without his knowledge or consent, he shall be exempt from the fine, and the other person may be summarily convicted. In a case[1] under this section, a builder was summoned "for that he did in the Parish of Clapham, within the Metropolitan Police District, so repair a certain drain, to wit, the drain to a certain house, as to be a nuisance and injurious to health." On the hearing of the summons it was contended, by the owner of the house, that the builder who actually did the repairs to the drain was the person who undertook or executed the said repairs within the meaning of the said section. The magistrate dismissed the summons, being of opinion that upon the true construction of the said section, and as a matter of law, the owner of the dwelling house was the person who, in the first instance, undertook the repairs within the meaning of the section, and that the builder was not liable to be summoned, except under

[1] *Young* v. *Foster*, (1893) 69 L.T. 147.

the circumstances set out in the proviso under the said section. The magistrate, however, agreed to state a case. Mr. Justice Charles, after quoting Section 42 of the Public Health (London) Act, 1891, said: "The magistrate thought fit—as we think wrongly—to dismiss the case against the respondent, without going into it at all, on the construction of the Public Health (London) Act, 1891, a construction which we deem to be erroneous. We think the respondent (the builder) was the person who undertook the execution of the construction or the repairs in question, and, therefore, we think the magistrate did not take a right view of the law. It may be, and very likely is, that the respondent has ample matter for a defence, but he must argue the other points before the magistrate. All we say now is, that we think the magistrate came to an erroneous decision in dealing with the case in the way he did, and we remit the case back to him to be dealt with further."

Under Section 121 of the Public Health (London) Act, 1891, any costs or expenses which are recoverable by the Sanitary Authority from an owner, may be recovered from the occupier, who may deduct the same from his rent, unless he has agreed with his landlord to bear such expenses.

Where, on a sale of land within the metropolis, by the conditions of sale the date fixed for completion was May 8th, and all outgoings up to that day were to be paid by the vendor. Before May 8th a magistrate made an order to take down dangerous structures on the land. This order was not complied with, and after May 8th the County Council took down the structures, and demanded and received from the purchaser the

expenses of so doing. The purchaser sued the vendor and recovered the expenses, the Court holding that, the liability having been incurred before May 8th, the expenses were "outgoings" within the meaning of the conditions for which the vendor was liable.[1]

Also, under a covenant "to pay and discharge all taxes rates *duties* and assessments whatsoever," a tenant was held liable for reconstructing a drain in accordance with the requirements of the Local Authority under Section 85 of the Metropolis Management Act, 1855.[2]

Under a similar covenant the tenant was held liable for the cost of connecting the drains of a house with the sewer.[3]

A tenant who covenanted "to pay all rates taxes assessments and outgoings whatsoever," and also "to keep the premises in a tenantable state of repair damage by fire and tempest and all ordinary wear and tear alone excepted" was held liable for remedying defective drainage under the requirements of the Sanitary Authority. The fact that the tenant was not liable for such defects under the repairing covenant (owing to the fair wear and tear exception) did not lessen his liability to pay such expenses under the covenant to pay "outgoings."[4]

On the other hand, under a covenant "to pay all rates taxes and assessments whatsoever which now are or during the said term shall be imposed or assessed

[1] *Tubbs* v. *Wynne*, [1897] 1 Q.B. 74.

[2] *Farlow* v. *Stevenson*, [1900] 1 Ch. 128.

[3] *Clayton* v. *Smith*, (1895) 11 T.L.R. 374.

[4] *Bettingham, In re; Melhado* v. *Woodcock*, (1892) 9 T.L.R. 48; *Antil* v. *Godwin*, (1899) 15 T.L.R. 462.

upon the said premises or the landlord or tenant in respect thereof by authority of Parliament or otherwise (except the landlord's property tax)," and "to make uphold support cleanse and repair and keep in repair all . . . sewers drains cesspools necessaries privies vaults and other easements belonging to the said premises," it was held that the tenant was not liable to repay his landlord the cost of re-arranging the drainage system and making a connexion for the first time between the drains of the house and the public sewers as required by the Local Authority, in order to abate a nuisance under Section 94 of the Public Health Act, 1875. The question in this case was whether the payment which the landlord had to make, to connect a drain from his premises with the sewer, was a "rate tax or assessment" within the covenants. Mr. Justice A. L. Smith held that it was not, and with regard to the second covenant he did not think the words included the making of a new drain.[1]

In a case where, in a lease, the tenant had covenanted to pay all present and future rates, taxes, duties, assessments and outgoings charged upon the demised premises or the owner or occupier in respect thereof, it was held that the covenant did not apply to expenses of private street works, which under the Private Street Works Act, 1892,[2] had become a charge upon the premises on the completion of the works *before* the date of the commencement of the lease, though not payable until after that date.[3]

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[1] *Lyon* v. *Greenhow*, (1892) 8 T.L.R. 457.

[2] 55 & 56 Vict., c. 57.

[3] *Surtees* v. *Woodhouse*, [1903] 1 K.B. 396.

A similar decision was given in an action by the landlord to recover from his tenant the apportioned expenses of paving a street under Section 150 of the Public Health Act, 1875.[1]

A consideration of these cases points an obvious moral to persons proposing to lease premises at a rack-rent, viz.—that they should on no account assent to the words "outgoings," "duties," "charges," or "impositions" being inserted in the covenant to pay rates and taxes. They should agree to pay nothing beyond *rates and taxes.*

Under Section 104 of the **Public Health Act, 1875,** the expenses relating to nuisances, which are recoverable from the owner of the premises, may be recovered by the Local Authority from the *occupier*, who may deduct such expenses from his rent as it becomes due.

This section does not, however, affect any contract existing between the landlord and the tenant, so that if the tenant in his lease has agreed to pay such expenses he will not be entitled to deduct them from his rent.

Other expenses under this Act are only recoverable by the Local Authority from the owner (without prejudice to his right to recover the same from his tenant under covenants contained in the lease), except that the Local Authority may under Section 257 declare such expenses to be payable by annual instalments, which may be recovered from the owner or occupier, and the latter may deduct three-fourths of the same from his rent.

[1] *Lumby* v. *Faupel*, (1904) 20 T.L.R. 237.

Under the **Public Health Acts Amendment Act, 1890,**[1] Part III. (when this Part of the Act has been adopted by the Local Authority), Section 19 (1):—

"Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section forty-one of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction."

By Section 35 of the Public Health Acts Amendment Act, 1890, all vaults, arches, and cellars under any street, and all openings into them in the surface of any street, and all cellar-heads, gratings, lights, and coal-holes must be kept in good condition and repair by the owners or occupiers of the same or of the houses or buildings to which the same respectively belong. In case of disrepair the Urban Authority may, after twenty-four hours' notice, do the necessary repairs, and the expenses of so doing shall be paid to the Urban Authority by such owner or occupier.

Under the Public Health Act, 1875, a drain which receives the drainage of two or more houses is a "sewer" and is vested in the Local Authority, and it is the duty of the Local Authority to repair it and keep it so as not to be a nuisance or injurious to health. This is still the law with respect to a drain which receives the drainage of two or more houses belonging to the

[1] 53 & 54 Vict. c. 59.

same owner. It will be noticed that the modification made by the Amendment Act only applies where the houses belong to *different* owners.

There have been various conflicting decisions as to whether a pipe draining houses of more than one owner is a "single private drain" or a sewer, and it would be beyond the scope of this work to consider them in detail. In a recent case the facts were as follows:— A row of houses, of which six belonged to the respondent Joseph, and the remainder to other owners, was drained by a system of pipes arranged as follows. The houses were drained in pairs; each house of a pair was drained by a separate pipe which discharged into a pipe common to both houses, and each common pipe discharged into a line of pipes laid in private ground behind the houses, which conveyed the drainage to a public sewer. It was admitted by the District Council that the common pipes through which the sewage of Joseph's houses passed were sewers within the meaning of the Public Health Act, 1875. In the House of Lords it was held that Joseph's houses were not connected with the public sewer by a "single private drain" within the meaning of Section 19 of the Public Health Acts Amendment Act, 1890, and that therefore Joseph was not liable under that section and Section 41 of the Public Health Act, 1875, to contribute to the expense of repairing the line of pipes behind the houses.[1]

Under Section 19 of the **Public Health Acts Amendment Act, 1907,**[2] (which is also an adoptive Act), in the

[1] *Wood Green Urban District Council* v. *Joseph*, [1908] A.C. 419.

[2] 7 Edw. VII., c. 53.

event of a private street being out of repair, and likely to be dangerous to foot passengers or vehicles, the Local Authority may require the frontagers to repair the street within a specified time, failing which the Local Authority may execute the repairs and recover the cost from the owners.

By Section 30, if in any situation adjoining a public street or footpath, any building, wall, fence, structure or other thing, or any well, excavation, reservoir, pond, etc., is, owing to want of sufficient repair, protection, or enclosure, dangerous to the public, the Local Authority may require the owner to repair, remove, protect or enclose the same, so as to prevent any danger, and, if he fails to do so, the Local Authority may do the work and recover the cost from the owner.

By Section 45, the Local Authority may, with the consent of the owner or occupier or by a magistrate's order, test drains (but not by water under pressure), and if the drains are found defective the Local Authority may require the owner to do the necessary work, and, if he fails to do so, they may do the work and recover the cost from the owner, either summarily, or the cost may be declared to be private improvement expenses and recoverable accordingly.

The following case[1] is interesting as illustrating the effect of a builder disobeying the order of a Sanitary Authority. Under the **Metropolis Management Act, 1855,**[2] the duty of repairing sewers lies on the Sanitary Authority; that of repairing drains on the owner of the house; and by the same Act a drain which, without an order of the Sanitary Authority in that

[1] *Kershaw* v. *Taylor*, [1895] 2 Q.B. 208.

[2] 18 & 19 Vict., c. 120.

behalf, drains more than one house is a sewer. A builder in 1887 built in the Metropolis four houses, which he, contrary to the directions of the Sanitary Authority, caused to be drained into one drain. He subsequently sold the houses to different purchasers. In a proceeding to compel the purchaser of the premises, in which the drain which so received the drainage of the four houses was situate, to repair the drain for the purpose of remedying a nuisance caused by its defective condition, it was held that the purchaser was not estopped by the wrongful act of his predecessor in title (the builder) from alleging that the drain in question was a sewer, and that the duty of repairing it consequently lay not on him but on the Sanitary Authority.

Perhaps the most important case decided in connection with the question of combined drainage was that of the *St. Martin-in-the-Fields (Vestry of)* v. *Bird*.[1] The defendant was the owner of the well-known but now non-existent Lowther Arcade, in the Strand, London, which consisted of a passage arched over by a common roof, with houses and shops to the number of twenty-five in all, on either side, each being separately rated. At either end of the passage, through which there was no public right of way, were gates, which were closed at night, the only access to the houses and shops being by means of this passage. The houses and shops drained into a common drain, which ran along under the passage into the sewer in the street at one end. It was held that the drain was a "sewer," for the maintenance and repair of which the Vestry

[1] [1895] 1 Q.B. 428.

was liable within the meaning of Section 69 of the Metropolis Management Act, 1855, and that the Arcade was not a "building" or "premises within the same curtilage" within the meaning of Section 250 of that Act. This judgment was appealed against, but was confirmed.

In another case[1] the appellant was the owner of buildings, consisting of forty-six sets of apartments divided into two blocks separated by a causeway 20 feet wide, which opened into a public thoroughfare. Access to one of the blocks was obtained from the causeway; the only access to the other being from the thoroughfare. In the causeway was a dust-bin for the common use of the occupiers of both blocks. The premises were drained by branch drains running from the sets of apartments into a main drain, which ran into a sewer within 100 feet of the blocks. It was held by the Court of Appeal that the main drain was "used for the drainage of premises within the same curtilage," and was, therefore, a "drain," and not a "sewer," within the meaning of Section 250 of the Metropolis Management Act, 1855; so that the owner was liable to pay the expenses of works of alteration and amendment done to such drain by the Vestry of the parish.

The definition of "owner" in the **Housing of the Working Classes Acts, 1890 to 1909,** in addition to the definition given by the Lands Clauses Acts, includes all lessees or mortgagees of any premises required to be dealt with under this Part of the Act (Part 2 of the Act

[1] *Pilbrow* v. *The Vestry of St. Leonard, Shoreditch*, [1895] 1 Q.B. 433.

of 1890), except persons holding or entitled to the rents and profits of such premises under a lease the original term whereof is less than twenty-one years.[1]

Under these Acts the Local Authority may, if satisfied that any dwelling house is in a state dangerous to health, take proceedings against either the owner or occupier for the purpose of closing the same, and within seven days after such order has been obtained, and notice served upon him, the occupier must cease to inhabit such dwelling house, and if such dwelling is not rendered fit for habitation the Local Authority may proceed to order its demolition. Under Section 47 of the principal Act (*i.e.*, the Act of 1890), an owner may apply to a Court of summary jurisdiction if default is being made in the execution of any works required to be executed on any dwelling house in respect of which a closing order has been made under this Act, or in the demolition of any building, or in claiming to retain any site, and the interests of such owner will be prejudiced by such default, and the Court may make an order empowering the owner to forthwith enter and do what is necessary. Section 48 of the principal Act provides that nothing in Part 2 of that Act shall prejudice or interfere with the rights or remedies of any owner for the breach, non-observance, or non-performance of any covenant or contract by a tenant; and if any owner is obliged to take possession of a dwelling house, in order to comply with a notice or order under the Act, such taking possession shall not affect the owner's right to avail himself of any such breach, non-observance or non-performance that may have occurred prior to his so taking possession.

[1] See Housing, Town Planning, etc., Act, 1909, Section 49 (2).

In a recent case[1] on the subject of repairs as connected with the water supply, a water company, supplying a consumer with a constant supply of water for domestic purposes, opened up the roadway and found a defect in the communication pipe causing a serious waste of water. They gave him written notice to repair the pipe, and on his failing to do so, cut off the water and refused a further supply. By Section 28 of the Metropolis Water Act, 1871,[2] in the case of a constant supply, every owner or occupier, upon whom notice has been served under this Act, shall provide the prescribed fittings and shall keep the same in repair. By Section 3 the term "fittings" includes communication pipes.

By Section 32, if any person supplied with water wrongfully fails to do anything which, under the provisions of the Act, ought to be done for preventing the waste of the company's water, they may cease to supply him so long as the injury remains unrepaired. It was held that on these facts the company were entitled to cut off the supply until the pipe was repaired, and that therefore they were not liable to the penalty imposed by Section 43 of the Waterworks Clauses Act, 1847,[3] for "neglecting or refusing" to supply water to consumers.

In a recent case, a lady sued the Metropolitan Water Board to recover damages for personal injuries sustained in consequence of their alleged negligence in allowing a stop-cock box in the pavement to remain

[1] *Grand Junction Waterworks Company* v. *Rodocanachi*, [1904] 2 K.B. 230.

[2] 34 & 35 Vict., c. 113.

[3] 10 & 11 Vict., c. 17.

in a defective condition. The stop-cock box had been constructed by one of the Board's predecessors, a London Water Company, the stop-cock being connected to the communication pipe which carried the supply of water from the main to a house. The County Court Judge held that the stop-cock box was the property of the owner or occupier of the house, and not of the Board, and he held that the provisions of Section 8 of the Metropolitan Water Board (Charges) Act, 1907 [1] (which imposes on the owner or occupier of premises requiring a supply of water the obligation of providing, laying, and maintaining the communication pipes and other apparatus), were retrospective in their character, and that therefore the Water Board were not liable for the injuries sustained owing to the defective condition of the stop-cock box. The Court of Appeal, reversing the judgment of the Divisional Court, upheld this decision.[2]

It is understood, however, that there is a probability of an appeal to the House of Lords in this case.

[1] 7 Edw. VII., c. 171.

[2] *Batt* v. *Metropolitan Water Board*, [1911] 2 K.B. 965.

CHAPTER XIX.

PRACTICAL POINTS.

SOME practical points with regard to the law of Dilapidations, from the tenant's point of view, may be of use to the surveyor in advising his client, or to the layman who is about to enter into a lease of an unfurnished house.

First, as to the condition of the premises. It will be remembered that, apart from houses coming within the provisions of the Housing of the Working Classes Acts, 1890 to 1909, there is no implied contract on the part of the landlord that the premises are safe, or that they are fit for human habitation, or that they will last the length of the lease.

If a tenant takes a house and in the lease agrees to keep and leave it in repair, and there is no allowance for fair wear and tear, he will have to make good any damage to it, however caused, and although occasioned by lightning, fire, storm or flood, and this may even involve rebuilding parts of the house if, owing to natural decay, they are beyond repair and have been condemned by the Local Authority.

In advising a prospective tenant as to his liability for repairs, the surveyor should point out to him the risk he is taking, especially in the case of an old building, and the tenant should endeavour to get a clause inserted in the repairing covenant that "damage by fire flood tempest lightning or explosion" is excepted.

When the landlord refuses to insert such a proviso, it is of the greatest importance to have a thorough survey and report as to the state of the premises, including the condition of the roof timbers and floors, and the state of the drains or cesspools, the latter being of the highest importance, in view of the heavy expense which may afterwards be incurred in remedying defects or re-constructing the drains.

For instance, the tenant of a small country house on a three years' agreement may find that the cesspool, which has been represented to him as only requiring emptying once a year, will in fact require emptying every quarter, involving an unexpected outlay. Or the cesspool may be found to be defective and leaky, which may necessitate rebuilding it.

Another point which should be pointed out to the tenant is that he should on no account, in the covenant to pay rates and taxes, also agree to pay "outgoings," "duties," "impositions" or "charges" in cases where the roads have not been made up or sewered, or where the premises are not connected with a public sewer, as otherwise he will find that he is liable to pay such expenses to the Local Authority or to his landlord (if the latter has paid the Local Authority), or the expense of re-draining or providing water-closets where none existed before.

As has already been shown, if the premises are destroyed by fire, even if damage by fire is excepted from the tenant's liability, he still cannot compel the landlord to rebuild, unless the latter has expressly covenanted to do so in the lease, and the tenant will continue liable to pay rent until the end of the lease, unless the lease contains a clause abating rent

while the premises are uninhabitable. Unless the landlord covenants to insure, and to expend the money received from the Insurance Company in rebuilding, the tenant should, of course, insure against fire, and, by paying a small extra premium, can also insure against continued liability for rent, and the expenses of architect's fees, etc., in rebuilding.

If the landlord has covenanted to insure, but the lease does not provide for rebuilding the premises, the tenant, in the event of a fire, should at once make a request to the Insurance Company either to expend the insurance money in rebuilding, or obtain security from the landlord for so doing, before payment of the insurance money to the landlord.

It will be remembered that in the case of a furnished house there is an implied contract on the part of the landlord that at the commencement of the tenancy the house is fit for habitation, but that this implied contract does not continue throughout the tenancy, so that the landlord will not be liable if subsequently the drains are found to be defective. It is therefore as important for the tenant not to agree to pay "outgoings," "duties," etc., in the case of a furnished house as in the case of an unfurnished one.

In advising the landlord as to the repairing covenants, the surveyor should, of course, endeavour to make the tenant liable for all repairs. "Fair wear and tear" should not be inserted in the covenant. The tenant should be required to insure against fire and to expend the money received in rebuilding to the satisfaction of the landlord or his surveyor; to paint the exterior of the premises once in every third year, and in the last

year of the lease; and to paint, paper, whitewash, etc., the interior every seventh year, and in the concluding year of the lease. If these repairs, etc., are not executed, the tenant to execute the same within a specified time, after having received notice from the landlord to do so.

The lease should provide for forfeiture for breach of covenant to repair, or it should reserve to the landlord, in the event of breach of the repairing covenant, the right to enter and execute the necessary repairs at the cost of the tenant. The right for the landlord or his surveyor to enter and view the state of the premises, at all reasonable times, should also be reserved.

The lease should make the tenant liable for "all rates taxes assessments outgoings impositions charges or duties whatsoever in respect of the demised premises which during the term shall be imposed charged or assessed upon the landlord tenant or occupier of the premises by the authority of Parliament or otherwise."

These covenants will be found set out at length in Chapter VI.

APPENDICES.

APPENDIX A.

EXAMPLES OF EXAMINATION QUESTIONS.

THE following are examples of the type of question set by the examiners of the Surveyors' Institution :—

(1).—Would it be any defence to a claim for breach of covenant in a lease to keep in repair, merely to prove that the premises were in as good a condition as they were in when possession was taken under the lease?

(2).—What are the legal liabilities of a tenant to maintain and repair fixtures on the demised premises, which were included in his hiring, but as to which there is no express stipulation in the lease? What are the like liabilities as to fixtures put up by the tenant during his term?

(3).—In making an estimate of the dilapidations accrued under an ordinary covenant to repair, would you make any difference between a house which at the commencement of the lease was old, and one which was then new? State what principle of valuation you would adopt in this respect.

(4).—Give explanations of the following expressions, with illustrations :—

Voluntary waste.
Permissive waste.
Tenantable repair.
Substantial repair.
Habitable repair.

(5).—A tenant having covenanted to keep premises in repair neglected to do so, and after he had given up possession the lessor brought an action for loss of rent during the period he was doing up the house, consequent on the tenant not having done so before he left. Would such an action be maintainable?

(6).—A lessee holds under a lease containing a covenant to well and substantially repair and leave in repair. After some time he under-lets, the under-lease containing the same covenant. At the end of the term the superior landlord recovers a sum for dilapidations against his lessee. Is the under-lessee liable, and why?

(7).—By whom, against whom, and by what means may a claim to have dilapidations remedied be enforced :—

a.—In the case of a benefice under sequestration ;

b.—In the case of a benefice not under sequestration ?

(8).—Upon what principle would you value dilapidations to a rectory, glebe house and premises, as between the executors of a deceased incumbent, and his successor to the living ?

(9).—A lease contains a covenant to repair and keep in repair. After the lessee has signed the lease, and before he has taken possession, the premises are burned down. What are the tenant's obligations ? What are his obligations and rights under a similar lease if the premises are condemned under the London Building Act, 1894 ?

(10).—A tree grows on land held on lease, near a neighbour's building, so that if it fell in that direction damage would ensue. The neighbour gives notice to the owner and to the lessee that the tree is, as was the fact, in a dangerous condition and likely to fall. Before any precautions were taken the tree fell and caused damage to the neighbouring buildings. Is either the owner or lessee liable ? Give your reasons.

(11).—A party wall between two houses situated within the metropolitan area is out of repair. What are the rights of the adjoining owner under the Building Acts, and how and at whose expense may such rights be enforced ?

(12).—What is the rule as to the extent of a lessee's liability to reinstate premises demised under ordinary covenants to repair, and in what cases, if any, can he be called on to rebuild ?

APPENDIX B

METROPOLITAN BUILDING ACT, 1774.

(14 Geo. III., c. 78.)

An Act for the further and better Regulation of Buildings and Party Walls, and for the more effectually preventing Mischiefs by Fire within the Cities of London and Westminster, etc.

Section **83.**—"And in order to deter and hinder ill-minded persons from wilfully setting their house or houses, or other buildings, on fire with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered:" be it further enacted, that it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire, and they are hereby authorized and required upon the request of any person or persons interested in or entitled unto any house or houses, or other buildings, which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses, or other buildings, have been guilty of fraud, or of wilfully setting their house or houses, or other buildings, on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses, or other buildings so burnt down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses, or other buildings, are insured, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively.

86.—And be it further enacted, that no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall, after the

said 24th day of June (1774), accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom to the contrary notwithstanding. And, in such case, if any action be brought, the defendant may plead the general issue, and give this Act and the special matter in evidence, at any trial thereupon to be had; provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

It appears to have been the intention of the Legislature to repeal both Sections 83 and 86 of the above Act.[1]

These sections, with certain others, were kept in force by Section 109 of the Metropolitan Buildings Act, 1855,[2] By Section 34 of the Metropolitan Fire Brigade Act, 1865,[3] the other sections were repealed, leaving Sections 83 and 86 alone in force.

By the Statute Law Revision Act, 1875[4] (Schedule), both Section 109 of the Metropolitan Buildings Act, 1855, and Section 34 of the Metropolitan Fire Brigade Act, 1865 (*i.e.*, the sections of the Acts which kept Sections 83 and 86 of 14 Geo. III., c. 78, in force), were specifically repealed. As, however, Section 1 of the Statute Law Revision Act, 1875, provides that "where any enactment not comprised in the Schedule has been repealed, confirmed, revived or perpetuated by any enactment hereby repealed, such repeal, confirmation, revivor or perpetuation shall not be affected by this Act," and since both Section 109 of the Metropolitan Buildings Act, 1855, and Section 34 of the Metropolitan Fire Brigade Act, 1865, were a "confirmation or perpetuation" of Sections 83 and 86 of 14 Geo. III., c. 78, and the latter enactment was not included in the Schedule of the Statute Law Revision Act, 1875, the result appears to be that both Sections 83 and 86 of 14 Geo. III., c. 78, are still in force, and that the inclusion of the above-mentioned sections in the Schedule was futile.

[1] 14 Geo. III., c. 78.
[2] 18 & 19 Vict., c. 122.
[3] 28 & 29 Vict., c. 90.
[4] 38 & 39 Vict., c. 66.

THE HOUSING, TOWN PLANNING, ETC., ACT, 1909.

(9 EDW. VII., c. 44.)

An Act to amend the Law relating to the Housing of the Working Classes, to provide for the making of Town Planning schemes, and to make further provision with respect to the appointment and duties of County Medical Officers of Health, and to provide for the establishment of Public Health and Housing Committees of County Councils.

[*3rd December, 1909.*

CONTRACTS BY LANDLORD.

14.—In any contract made after the passing of this Act for letting for habitation a house or part of a house at a rent not exceeding:—

(*a*) in the case of a house situate in the administrative county of London, forty pounds;

(*b*) in the case of a house situate in a borough or urban district with a population according to the last census for the time being of fifty thousand or upwards, twenty-six pounds;

(*c*) in the case of a house situate elsewhere, sixteen pounds;

there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation, but the condition aforesaid shall not be implied when a house or part of a house is let for a term of not less than three years upon the terms that it be put by the lessee into a condition reasonably fit for occupation, and the lease is not determinable at the option of either party before the expiration of that term.

15.—(1) The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation.

(2) The landlord or the local authority, or any person authorised by him or them in writing, may at reasonable times of the day, on giving twenty-four hours' notice in

writing to the tenant or occupier, enter any house, premises, or building to which this section applies for the purpose of viewing the state and condition thereof.

(3) If it appears to the local authority within the meaning of Part II. of the principal Act that the undertaking implied by virtue of this section is not complied with in the case of any house to which it applies, the authority shall, if a closing order is not made with respect to the house, by written notice require the landlord, within a reasonable time, not being less than twenty-one days, specified in the notice, to execute such works as the authority shall specify in the notice as being necessary to make the house in all respects reasonably fit for human habitation.

(4) Within twenty-one days after the receipt of such notice the landlord may by written notice to the local authority declare his intention of closing the house for human habitation, and thereupon a closing order shall be deemed to have become operative in respect of such house.

(5) If the notice given by the local authority is not complied with, and if the landlord has not given the notice mentioned in the immediately preceding subsection, the authority may, at the expiration of the time specified in the notice given by them to the landlord, do the work required to be done and recover the expenses incurred by them in so doing from the landlord as a civil debt in manner provided by the Summary Jurisdiction Acts, or, if they think fit, the authority may by order declare any such expenses to be payable by annual instalments within a period not exceeding that of the interest of the landlord in the house, nor in any case five years, with interest at a rate not exceeding five pounds per cent. per annum, until the whole amount is paid, and any such instalments or interest or any part thereof may be recovered from the landlord as a civil debt in manner provided by the Summary Jurisdiction Acts.

(6) A landlord may appeal to the Local Government Board against any notice requiring him to execute works under this section, and against any demand for the recovery of expenses from him under this section or order made with respect to those expenses under this section by the authority, by giving notice of appeal to the Board within twenty-one days after the notice is received, or the demand or order is made, as the case may be, and no proceedings shall be taken in respect of such notice requiring works, order, or demand, whilst the appeal is pending.

(7) In this section the expression "landlord" means any person who lets to a tenant for habitation the house under any contract referred to in this section, and includes his successors in title; and the expression "house" includes part of a house.

(8) Sections forty-nine and fifty of the principal Act, as amended by section thirteen of the Housing of the Working Classes Act, 1903 (which relate to the service of notices and the description of owner in proceedings), shall apply for the purposes of this section, with the substitution, where required, of the landlord for the owner of a dwelling-house.

(9) Any remedy given by this section for non-compliance with the undertaking implied by virtue of this section, shall be in addition to and not in derogation of any other remedy available to the tenant against the landlord, either at common law or otherwise.

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